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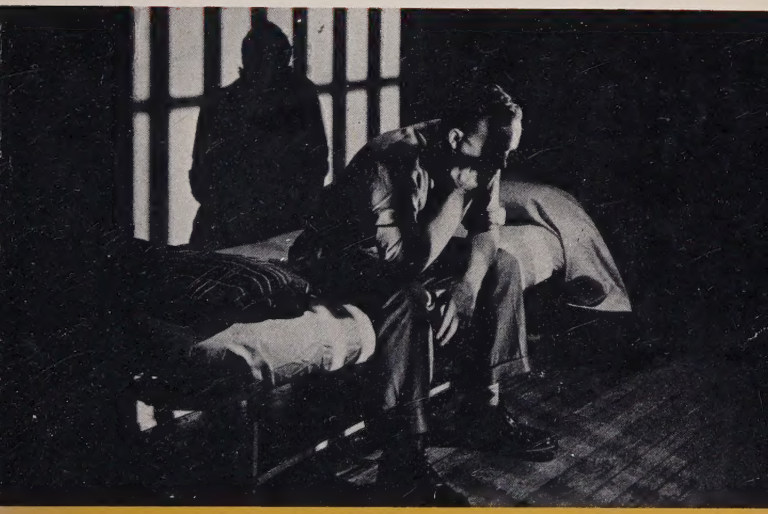

For readers who thrilled to MY LIFE IN COURT and COURTROOM, the story of the innocent—wrongly accused. "Fascinating" —Edward Bennett Williams
author of ONE MAN'S FREEDOM

by Judge Jerome Frank and Barbara Frank
with a Foreword by Justice William O. Douglas

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THE ACCUSED:

". . . Innocent people get sent to prison . . . ordinary people . . . leaves you thinking that what you need is not so much a clear conscience as money, a good lawyer, and a lot of luck."

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"A great man, a great judge, a great American."

—BULLETIN OF THE MENNINGER CLINIC

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ABOUT THE AUTHORS

The late Jerome Frank was a judge of the U.S. Circuit Court of Appeals. He was a man who received hundreds of letters from men in prison asking his help.

Previous to NOT GUILTY, Judge Frank found time to write four other probing, articulate books which reflected his personal brilliance as a jurist.

Barbara Frank, his daughter, early acquired her father's intense interest in people. She is always ready to engage in any work dedicated to the alleviation of human suffering.

NOT GUILTY

by JUDGE JEROME FRANK
and BARBARA FRANK
in association with
HAROLD M. HOFFMAN

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Dedication:
For FLORENCE KIPER FRANK

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PREFACE

Early in the fall of 1953 my father asked me whether I would like to collaborate with him on this book, since he felt that narrative writing was my forte and that, being a layman, I could help him write the book in a way that would interest the lay public, for whom he intended it. In accord with his point of view about the subject of the book, and honored by his confidence in me, I enthusiastically agreed. We decided that I should write the narrative and he the comments and concluding chapter. Roughly, that is the way we worked, although each of us also contributed to the sections written by the other.

In the summer of 1954 we found it necessary, for the moment, to abandon work on the project but in 1955 were able to resume. On January 11, 1957, we made the last change in the final draft of the manuscript. I went to sleep that night with a happy feeling of accomplishment. I like to think that he did too.

At noon the following day an ambulance carried my father to the hospital. His generous heart, which in his sixty-seven years had rarely failed another human being, was finally neglecting him. At four-fifty the next morning, on January 13, he died, painlessly, in his sleep. It is too soon for me to say any more than this: I am proud to be his daughter and to have shared this book with him.

On behalf of both of us I wish to make the following acknowledgments: In the period during which we suspended work on the book, my father renewed his acquaintance with a New York lawyer, Harold M. Hoffman, whose name, as a result, appears on the title page. His contribution to our efforts proved invaluable: a wealth of carefully researched, fascinating case histories he had compiled for a course in law at Yale. We used many of the facts he had collected as the basis for a very considerable portion of the narrative.

Louise Ferrigno, who quite sincerely deprecates her talents as a critic but who actually has a keen critical mind, called our attention to flaws in the manuscript we might have overlooked, and suggested remedies that worked. Gerald G. Schulsinger took time out from a busy legal career in Washington, D.C., to read several narrative sections still in a tentative stage and to write us his detailed, and immeasurably helpful impressions. Walter E. Shuttleworth several times interrupted a hectic career on the *Yale Law Journal* to research facts on many of the cases we have narrated. His research was both thorough and imaginative. My mother gave us the benefit of her fine critical mind by constructively criticizing many of the narrative sections both as to their literary merit and their clarity. In almost every instance we made the revisions she thought we should. Harriet Pilpel, out of the experience gained from her own brilliant legal and writing career, gave us advice particularly concerning legal aspects of the book that was, as always, sound.

Barbara Frank
New Haven, Connecticut
January 28, 1957

FOREWORD

One who reviews the records of criminal trials need not look long to find an instance where the issue of guilt or innocence hangs in delicate balance. A judge who denies a stay of execution in a capital case often wonders if an innocent man is going to his death. Judges in the state courts usually have broad powers to act. If, however, it is the judgment of a state court on review in the United States Supreme Court, the federal judge cannot act to stay execution merely because he has doubts about the guilt of the defendant. Only constitutional questions are open. But even where the constitutional questions are unsubstantial and without merit and the federal judge is powerless to act, doubts as to the correctness of the conviction may linger on.

Those doubts exist because our system of criminal justice does not work with the efficiency of a machine—errors are made and innocent as well as guilty people are sometimes punished. Professor Borchard dramatically illustrated the point a quarter century ago in *Convicting the Innocent.*

Constitutional guarantees which ensure a fair trial are not slick lawyers' tricks by which known criminals are set free. In a democratic society, the means are all important. We are a civilized people; and our law rejects the use of torture or other uncivilized methods to obtain convictions. We believe that it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.

Yet the sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who wield the power of life and death itself—the police officer, the witness, the prosecutor, the juror, and even the judge—become overzealous in their concern that criminals be brought to justice. And at times there is a venal combination between the police and a witness.

The capacity of our legal system to produce injustices is

the starting concern of the Franks in this book. Next is their concern with the means used to secure convictions. An insistence on fair procedure is the great truth by which Jerome Frank lived. Concern for it made him a truly great jurist of our time. He was sensitive always to the plight of the defendant without funds to match the unlimited resources of the prosecutor. He was ever zealous in demanding that the guarantees designed to insure fair criminal trials be liberally construed and rigidly followed. He crusaded for sweeping changes to alleviate the deficiencies in the means by which we sort the innocent from the guilty. And his crusade was most timely because too many important people had become apathetic toward these deficiencies.

This book illustrates the faith and crusading spirit which endeared Jerome Frank to those who knew him.

He and his daughter have infused these pages with that spirit, as they unravel some of the unjust and unfair convictions which have resulted in recent years.

WILLIAM O. DOUGLAS

April 6, 1957

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CHAPTER ONE

Joe Majczek and Theodore Marcinkiewicz

1

In the year 1932, twenty-four-year-old Joe Majczek, an electrician by trade, was living with his wife, Helen, in an apartment at 30212 Farrell Street, Chicago, Illinois. Born in Poland when his mother, Tillie, was sixteen, Joe, at the age of one, had traveled with his parents to America. The family moved into a house at 2038 West Fifty-second Street, a district of Chicago populated mainly by the Majczeks' countrymen, the same neighborhood where Joe and Helen later lived. Tillie's husband, Michael, found a job in the city's stockyards and, within the next few years, Tillie bore three more children.

In the depression year of 1932 Joe, like hordes of his fellow citizens, was out of work. As an added financial strain, Joe and Helen soon expected the birth of their first child. But being full of youthful energy and very much in love, Joe probably felt competent to solve his problems and, in almost all the ways that mattered most, was satisfied. Certainly in later life his retrospective longing for that period must have been intense.

What happened at 3 P.M., December 9, 1932, wholly changed the direction of Joe's life.

Even for Chicago, on that day, the temperature was unseasonably low. The thermometer registered eight degrees below the zero mark, and Joe, at home, was spending a domestic afternoon. While Helen occupied herself with household tasks inside, Joe helped his father-in-law, who lived in the same building, to store a ton of coal the dealer had left for them in the alley next to the apartment house. Joe and Hel-

en's father, dressed in their warmest clothes, shoveled the coal into baskets, then carried the baskets to a shed in the rear of the building. The job took several hours and occasionally between trips Joe and his father-in-law walked up to Joe's apartment, on the second floor, to join Helen in a cup of coffee and a cigarette near the warm stove. Nothing in the normal, tranquil afternoon gave warning of the tragedy ahead.

Elsewhere in the same neighborhood a crime was taking place.

A woman (who in this record will be called Mrs. Jones) owned a store near Joe's home, where she also sold whiskey in violation of the prohibition law. There the crime occurred at three o'clock.

Mrs. Jones had her living quarters in the same building. Since the house was cold, she had retired to her somewhat warmer kitchen, alert for sounds indicating customers inside the store. With her, companionably seated around the table near the stove, were two acquaintances: a uniformed police officer, William Lundy, who had stopped in for a chat, and John Zagata, a coal dealer who had just made a delivery to Mrs. Jones and remained to pass the time of day.

During a pause in the comfortable conversation Mrs. Jones heard a sound she recognized as the closing of the front door. Thinking that she had a customer, she left her guests to go into the store. Two men stood near the cash register, their grim purpose immediately clear: Each carried a revolver in his hand. One of the bandits, pointing his gun at Mrs. Jones, ordered her to raise her hands. Mrs. Jones hastily obeyed. The men, closing in on her, roughly pushed her through the open kitchen door. One of them looked into the kitchen to find out if anyone else was there. Seeing Zagata and the armed policeman seated at the table, the bandit called a warning to his companion. Lundy rose, taking his revolver from its holster, and stood his ground as the gunmen advanced on him. Mrs. Jones screamed, ran into a closet, and slammed the door against the violence impending in the room outside, while Zagata hurried out a door leading from the kitchen to the street.

A postman, Joseph Becker, passing on the street, heard Mrs. Jones scream, then the sound of seven shots inside the house. He saw two men, revolvers in their hands, race into the street, get into an automobile, and speed away.

Becker ran into the store. Near the front door lay Lundy's

bullet-torn, bleeding dead body. Becker hastened to the phone and summoned the police.

That month Chicago's police files were in bad shape. Because the prohibition law had not stopped the sale of liquor but had, instead, multiplied the now illegal profits of such sales, bootlegging had become a thriving industry in the city. As a result Chicago's gangsters had increased in number, as had the city's crimes of violence. The police files contained many unsolved murders, including Lundy's. To make matters worse, the World's Fair was to open in Chicago soon, and the mayor thought that the city's much-advertised, very bad police record might keep potential customers away. The state's attorney, conferring with the mayor, agreed that every effort should be made to remedy this record before the fair's advent.

As to Lundy's murder in particular, however, in the minds of the police a more important matter was at stake: A brother officer had been murdered and therefore, to his comrades, this was no ordinary crime. Lundy's violent death appeared to the police sufficient reason to administer justice in its ancient form. Indeed, it was not whose eye that mattered, or whose tooth, only that the crime should be avenged.

The police called Mrs. Jones to headquarters for questioning. She told them that she would not be able to identify the killers.

"I was so scared I ran away before I could look at them," Mrs. Jones said.

But the police did not intend to let the matter rest at that.

Ted Marcinkiewicz, a childhood friend and schoolmate of Joe Majczek's, lived in the Majczeks' neighborhood with his stepmother and his invalid father. Because the elder Marcinkiewicz had been ill for several years, Ted had taken on the responsibility of looking after an apartment house his father owned, keeping the building running smoothly, and collecting rents.

Early on the evening of December 9, Ted, walking home, was stopped by a friend who warned him that the police had a warrant for his arrest. It seemed that Mrs. Bessie Barron—a young housewife who was Ted's neighbor and a friend of Mrs. Jones—when questioned by the police earlier that day, had told them that Ted might be one of the gunmen who had killed the officer in Mrs. Jones's grocery store.

Although he was innocent of the murder, and had an alibi, when Ted learned that the police wanted him, he suddenly became terrified: He believed that the police would not hesitate to use the third degree, or attempt to frame him in some other way, in their zeal to avenge Lundy's death.

Ted hastened to the Majczeks' apartment, and asked the young couple to hide him for a while. When Joe and Helen heard his story, they agreed at once.

Ted stayed with Joe and Helen for three nights and days, concealing himself from the police. Perhaps belatedly realizing that he had placed his friends in jeopardy, on December 12 he left their home for some other hide-out.

Ten days later, on December 22, a bootlegger known as "Alex" had a minor auto accident. When, in the early morning hours, the police were summoned to the scene, they questioned Alex, as they were questioning everyone in any way connected with the underworld, about the Lundy murder case. Alex, who knew through the grapevine that the police were looking for Ted Marcinkiewicz, admitted driving him, the night of December 9, to Joe Majczek's home.

At 5:45 A.M., December 22, shortly after Alex had given his information to the police, a squad car pulled up in front of Joe's and Helen's apartment house. Two policemen got out and rang the Majczeks' bell. Joe opened the door but, too rudely aroused from his heavy, early morning sleep, appeared to hesitate when the officers asked him if he knew Ted Marcinkiewicz. The police, thinking that Joe was trying to stall for time, took Joe and Helen to headquarters for questioning.

There Joe, now fully awake, said that he did know Ted, adding that Ted had recently stayed with him. However, he went on to say, he did not know where Ted could presently be found. The police apparently thought that he lied. Realizing, however, that Helen did not have the information they sought, the police released her, telling her that they were holding Joe, who would be home as soon as he told the truth about Ted's whereabouts.

The next time Helen set eyes on Joe, he was behind bars, charged with Lundy's murder.

As long as they had Joe in custody, perhaps the police thought they had better try him out for size. At any rate, on Thursday afternoon, December 23, they confronted Joe with the three people who had seen the holdup men.

Becker, the postman who, in passing by the store, had heard the shots, said that, since he had seen the killers only in their frantic flight, he would not recognize either one of them. Zagata, the coal dealer who had seen the killing, stated that he was prepared to swear in court that Joe was not one of the murderers. The police recognized that they could not prevail upon these witnesses to change their minds. But the officers believed they could persuade Mrs. Jones to identify the suspect even though, when first questioned, she had said that she would not recognize either of the criminals. The method by which the police persuaded Mrs. Jones to cooperate was not revealed for many years.

On first seeing him Mrs. Jones said that she did not recognize Joe. The police then took Joe into another room and an hour later, after a conference with Mrs. Jones, they brought her in to look at Joe again. Once more she failed to identify him. Nevertheless the police held Joe in custody overnight and at 3:45 P.M. the next day, after another conference with Mrs. Jones, they again asked her to identify him. This time she did not even hesitate.

"Yes, I know him," she said. "He is one of the killers."

The grand jury, on the basis of Mrs. Jones's testimony, indicted Joe for murder in the first degree.

Between the indictment and the trial Joe had several weeks in which to wonder what would happen to him now. There must have been the nightmare hours, but, on the whole, Joe was a man of common sense. Since he had not committed murder, the state could not prove otherwise. That an incredible error had been made would inevitably be demonstrated at the trial, for that's what trials were for: to find the truth.

So thinking, Joe was able to sleep at night.

The police continued an unsuccessful search for Ted Marcinkiewicz. However, on January 26, six weeks after Lundy had been murdered, Ted, bone-weary of the chase, turned himself in to the police, who again summoned Mrs. Jones to headquarters, this time to say whether she recognized the second suspect in the case. She immediately identified Ted as Joe's accomplice in the crime.

The grand jury indicted Ted for murder in the first degree. In February 1933, Joe and Ted together went to trial.

As the first witness for the state, Mrs. Jones took the stand.

She testified that Joe was the killer who, aiming his gun at her, ordered her to raise her hands. She also saw, she said, the beginning of the struggle which ended Lundy's life. According to this witness Ted was the second holdup man.

Since Mrs. Jones was the state's key witness, it was imperative that the defense attempt to show the jury that she lied or, at the least, was unreliable. Joe had informed his lawyer that twice, at headquarters, Mrs. Jones had not been able to identify him, but the lawyer, when he cross-examined, failed to question her about that all-important fact, or attempt to prove it in some other way. He told Joe that the matter was too trivial to bother with. The fact was, however, that, if Mrs. Jones's testimony had been undermined, the prosecution's case would have collapsed, since she was the only witness who testified that the men on trial were the murderers.

As the second witness, Mrs. Jones's friend, Mrs. Barron, swore that Ted, shortly before the murder, had questioned her about Mrs. Jones's grocery store and about the size of Mrs. Jones's bank account. When Mrs. Barron told Ted, so she testified, that the store was doing very well, Ted replied that he himself was broke and, referring to the grocery store, said he was "going to make the joint."

The state's third witness was an acquaintance of Ted, a man named Bruno Uginchus. He testified that, about 6 P.M. on December 9, while he was sitting in a parked car, the defendant, passing on the street, stopped to say he was "in a little trouble," and asked the witness for a ride. Uginchus drove to the corner of Forty-seventh and Wood with Ted on the running board; Ted then got off and went into a speak-easy. That testimony closed the prosecution's case.

The defendants presented alibis as the substance of their defense. Joe did not himself testify, relying on his witnesses for his alibi. Helen did not take the stand, since in Illinois a wife could not testify for her husband, but Helen's father did, and swore that at three o'clock, when the crime took place, Joe was at home, helping to haul some coal. The dealer who had delivered the coal testified that he had seen Joe there at that hour and that Joe's father-in-law then gave him a receipt for the delivery. The witness introduced a duplicate of the receipt.

Six witnesses appeared in court to establish an alibi for Ted. A neighbor testified that Ted had been with him, helping to thaw out a frozen pipe, until almost three, the hour at which the crime occurred. Ted's stepmother, two aunts, and

a business acquaintance of Ted's father, who had been calling on the elder Marcinkiewicz that afternoon, all swore that Ted had been at home from a little before three until almost three-fifteen, and that he then went to a speak-easy across the street. The bartender and a customer testified that Ted had remained in the speak-easy from ten minutes after three until six o'clock.

Ted then took the stand. He repeated the facts to which his alibi witnesses had testified. He elaborated on the conversation with Uginchus, saying that it was accurate but adding that he had also told Uginchus that he was scared because the police had a warrant for his arrest. He explained that Mrs. Barron had misunderstood her conversation with him: He had not said that he wanted "to make the joint" but that, considering Mrs. Jones attractive, he had thoughts of "making" her.

Another witness testified that Mrs. Jones had once addressed him as "Marcinkiewicz"; thus it would be clear to the jury, so the defense hoped, that since the witness bore no resemblance to Ted, Mrs. Jones could well have made a similar mistake about Joe. The last witness testified to Ted's good reputation in the community.

After each side summed up, the judge charged the jury about the legal rules they must apply to the evidence. The jury then retired to their weighty task: to decide which set of witnesses had lied, or erred, or told the truth, and, on the basis of that choice, to fix the future of the men on trial.

Perhaps the jurors reasoned that where there is smoke there is always fire, even if there is scarcely any smoke; that, although nine witnesses had supported the defendants' alibis, while only one witness said that they were the criminals, nevertheless the prosecutor, an honorable official of the state, would not bring suspects of dubious guilt to trial; and that the accused, at bay, might have gone to any lengths to establish a defense. Or perhaps that was not the jury's reasoning at all; it could as well have taken any other form. The fact is that, after two hours and forty minutes of deliberation, they returned to tell the court that the defendants were guilty of the charge.

As a matter of invariable routine, at this point in the proceedings the lawyer for the accused makes a motion for a new trial. But the defense counsel failed to make the customary move.

It happened that the judge, suspicious of Mrs. Jones's de-

meanor when giving testimony, and convinced of the defendants' innocence, had decided to grant the prisoners a new trial. But because their lawyer had failed to make the appropriate motion, the judge felt that he had no choice but to accept the jury's verdict. He sentenced each prisoner to ninety-nine years in Joliet, the state penitentiary. Late in 1933, Joe and Ted arrived at Joliet to begin serving their life terms.

Joe and Ted appealed the judgment to the Supreme Court of Illinois. Their basic argument was that the evidence presented by the state had been insufficient to convict.

The judges sitting on the upper court replied that since no motion for a new trial had been made in the court below, they could consider, not the sufficiency of the evidence, but only whether there had been improprieties in the conduct of the trial.

As to one issue, apparently minor, raised on the appeal, the court opinion had this to say: "On cross-examination [the witness Mrs. Jones] was asked whether it was not a fact she sold whiskey to two men whose names were stated and whether that was not a part of her business . . . Objections to the questions were sustained. Cross-examination is largely within the discretion of the trial court. A cause will not be reversed for alleged improper rulings on questions asked on examination unless the defendant has been prejudiced or deprived of a fair trial. The [defendants] were not prejudiced by the ruling of the court."

But if Mrs. Jones had answered the question, and had answered it truthfully, she would have admitted that she bootlegged whiskey; and beneath the surface of that fact lay the concealed rottenness of the prosecution's case. However, since, on the face of it, the trial had been conducted properly, the Illinois Supreme Court sustained the prisoners' convictions.

Eleven years went by. Events changed swiftly. The country moved from a depression to the threshold of prosperity, then into a world war, the start of the atomic age, and toward a troubled peace.

And Helen Majczek bore Joe's son. When the boy was seven years old, Helen, having agreed with Joe that she should divorce him for the child's sake, married an old friend who had stood by them both.

The world moved swiftly, while Joe Majczek and Ted Marcinkiewicz stayed in the state penitentiary, and Tillie, Joe's mother, fought to prove Joe innocent.

Tillie Majczek had begun her fight for Joe's release the day he was assigned his prison cell. For the evidence she had heard in court, and the jury's verdict, were so many hollow sounds to her. The only significant words that Tillie heard were Joe's, and Joe said he was innocent.

But Tillie was no fool. She fully realized that officially the case was closed. She felt sure that her son's only hope of vindication lay with her, but she needed help to prove Joe innocent, and realized that she needed money to stimulate anyone else's interest in clearing him.

Thus began the conflict between an uneducated, forty-one-year-old immigrant and the powerful forces of organized society. Tillie fought the battle on her hands and knees, after dark, for her husband, Michael, earned just enough for their support; as she was not trained in any trade, she got a job in a Chicago office building, scrubbing floors. She had to do her work at night, after the offices had emptied, and it was hard, exhausting work. It took a lot of scrubbing of a lot of floors to earn what Tillie thought necessary to free Joe. It also took eleven years.

On October 11, 1944, having reached the goal she set herself late in 1933, Tillie appeared at the offices of the Chicago *Times* to place this ad:

"Five thousand dollars reward for killers of Officer Lundy on December 9, 1932. Call Gro-1758, 12-7 P.M."

The man in charge of classified ads pricked up his ears. He told the city editor that Tillie was worth an interview. The editor agreed. His nose for news smelled a human-interest story, good for one or two issues of the *Times*, and he sent a reporter to talk to Tillie. When the reporter read Tillie's letters from Joe containing the facts about his trial, he sensed a story bigger than what it had first seemed. After several conferences with Tillie the city editor assigned two of his best men, Jack McPhaul and Paul McGuire, to investigate Joe's case, on the theory that to print the facts resulting from the investigation would probably advance the cause of justice, and would certainly advance the circulation of the *Times*.

McPhaul's and McGuire's investigation was conscientious and complete. For several months they interviewed all the

people still alive who had in any way been involved, and examined all available records. Nearly twelve years after his conviction Joe's full story was revealed. It did not at all resemble the story the prosecution had unfolded at his trial.

The *Times* published these revelations in a series of articles that, had they not been factual, would have invited some costly libel suits. No libel suit was ever brought. The articles reported an interview with Mrs. Barron, who, having learned the truth about the prosecution's case only after the trial had ended, was relieved to tell her story publicly at last. "On numerous occasions since the trial," Mrs. Barron said, "I personally heard [Mrs. Jones] admit that her identification of the two convicted men was improper and false. When I asked her why she did it, she replied, 'What the hell did you expect me to do? I had to go along with the police, didn't I?' "

For, as the *Times* series made clear at last, Mrs. Jones had lied when she testified that Joe and Ted were the killers in her grocery store. She had no idea who the killers were. However, the police had made it clear to her, that, unless she identified the suspects, she would be prosecuted for her violation of the prohibition law, and probably be sentenced to the maximum prison term. But, in return for her false testimony, the police promised to protect Mrs. Jones from arrest. For this protection the terrified state's witness paid with perjured testimony, and Joe Majczek and Ted Marcinkiewicz paid, respectively, with twelve and seventeen prison years.

That was how the death of Officer Lundy had been avenged. His murderers were never found.

The series in the *Times*, which had concentrated on Joe Majczek's case, attracted wide attention in the state of Illinois, and was directly responsible for his eventual release. In the month of August 1945, twelve years after he had begun his prison term, when Joe had reached the age of thirty-six, the Governor of Illinois granted him an unconditional pardon. In February 1946, the state legislature, by a special statute, awarded him $24,000 as compensation for his wrongful imprisonment.

Ted Marcinkiewicz, however, remained in prison for five years after Joe's release.

In spite of the undisputed revelations about his trial, the authorities evidently felt that Ted's innocence was not clear, since there was independent evidence pointing to his guilt. That evidence consisted only of one witness's testimony that

Ted had said he intended to rob the grocery store, and another's that, just after the murder, Ted had remarked that he "was in a little trouble"—evidence that, in itself, could not have supported Ted's conviction, which rested on perjured testimony induced by the police. At the very least, the disclosure of that perjury demanded a new trial. But the authorities took no action, and Ted remained a prisoner.

There is no record concerning Ted's attempt to get another day in court, or the obstacles he encountered on the way. But not until 1950, five years after the facts had been made public, did Ted succeed in obtaining a hearing, on habeas corpus, in the criminal court of Cook County, before Judge Thomas Lynch.

The judge's findings, based on the new evidence, were brief and to the point: It was now clear that, in 1933, Ted had been deprived of a fundamental constitutional right, due process of law. The judge ordered the prisoner's release.

Ted, believing that the state should compensate him for what he had endured, filed a claim for damages in the Illinois Court of Claims. The court rejected his petition, since Illinois had no general law allowing compensation to a man who had served a prison term for a crime in which it had not been proved he had played a part. If Ted feels no hatred of society, he is a stronger man than most.

2

If the conviction of an innocent man were as rare as a death from bubonic plague in the United States, we could afford to mourn the tragedy briefly and turn back to everyday affairs. Unfortunately such convictions are by no means so rare.

The conviction and imprisonment of innocent men too frequently occur to be ignored by any of us. There are too many cases on record to prove the point, and there may be countless others of which we know nothing.

Often (as later chapters will show) the conviction of the innocent is caused, not by perjury (as it was in the case just narrated), but solely by the fact that a jury believes the mistaken testimony of a witness who is entirely convinced that he is speaking the truth. Sometimes the mistake occurs because a defendant, for some reason or other, has not presented his best defense, a defense that, had he produced it, might have acquitted him. Sometimes, on the basis of extorted, false confessions, men have gone to prison or their death. Sometimes, too, when the prosecution is overzealous,

when evidence is concealed, suppressed, or manufactured, conviction of the innocent may result.

Majczek and Marcinkiewicz were the victims of government officials who helped to manufacture evidence that obscured the truth. The crime for which the two men stood trial was one that aroused strong feelings on the part of the police and these officers, yielding to these feelings, were themselves guilty of the outrageous crime of inducing perjury, a crime against the very society the laws are designed to protect. And their vicious conduct, besides leading to the long imprisonment of two innocent men, left the murderers at large, free to kill again.

The cases of Majczek and Marcinkiewicz also highlight this aspect of the problem: The prosecutor of a crime is, in a very special sense, an "officer of the court." Judges have often said that this official owes as great a duty to bring about the acquittal of the innocent as to assure the punishment of the guilty. Painful to report, some prosecutors have never learned or have ignored their duty to avoid, when possible, conviction of innocent men. Tragedies thus caused can be prevented. However, they will not cease unless we see to it that no prosecutor is elected or appointed until he has had a rigorous training in the nature of his obligation to all of us, and until we are reasonably assured that this training has sunk in.

The public prosecutor exercises tremendous power. As to all but relatively minor offenses, the fact that the police arrest a man does not mean that he will be prosecuted. The prosecutor can refuse to prosecute. If he decides to go ahead, he will usually present evidence against the suspect to a grand jury. If that body—with whom the prosecutor ordinarily has great influence—thinks the evidence of guilt sufficient to warrant a trial, it votes an indictment. An indictment, however, is not a determination of guilt. It serves only to initiate a trial before what is called a "petit" jury. It is that jury that, after hearing the evidence offered by the prosecutor and the accused, finds the latter guilty or not guilty. In some states there is no grand jury; to bring a man to trial, the prosecutor need only file an accusation, called an "information," charging the accused with the commission of a crime.

A popular notion prevails that, if an innocent man is convicted, the upper court, on appeal from the conviction, will surely set it aside. This notion is unfounded. We might call it

the "Upper Court Myth." For the upper court, on an appeal, knows no more than did the jury and the trial judge that, for instance, the police had not run down leads favorable to the accused, or that the prosecutor concealed evidence damaging to the case against the accused, or that a witness made a mistake in identifying the accused as the criminal.

The upper court, unaware of those facts, is obliged to accept the jury's verdict, since it is the function of the jury to decide which stories are correct—those told by the government witnesses or those of the witnesses for the defense. If the verdict is "guilty," the upper court must pay no attention to the testimony of the defense witnesses, and take as true the testimony of the government witnesses, even if that court suspects that they lied or were mistaken. In short, except in a few states, on an appeal the upper-court judges do not become a sort of new jury; they do not retry the case.

A lawyer's incompetence or carelessness may betray his innocent client. Majczek's lawyer failed, in cross-examining the government's chief witness, to prove—what that lawyer knew—that initially she had twice been unable to identify Majczek; and the lawyer did not, after the jury's verdict, make a motion for a new trial, which (as later appeared) the judge would have granted.

Most courts do not invariably wipe out a conviction resulting from serious errors by the accused's lawyer. They make this distinction: When the accused has no money to pay for a lawyer, the judge will usually appoint one, because it is generally believed that everyone charged with crime has the right to the assistance of counsel. If that lawyer is so incompetent that he fails to act as any well-trained lawyer should and would, and as a result the accused is convicted, the trial judge—or the upper court on appeal—will set aside the conviction, on the ground that the accused has not, in any real sense, had the assistance of counsel.

But most courts will usually not do so, if the man on trial chose and paid his own lawyer. Those courts reason thus: A lawyer appointed by the judge for the indigent accused is an "officer of the state." The state therefore has a responsibility for his conduct of the defense. If he was shockingly incompetent, the state has not accorded the defendant a fair trial. When, however, the defendant chose and paid his lawyer, the lawyer's incompetence "must be imputed to the man who employed him, and the lawyer's acts become those of his

client." In those circumstances the lawyer's bungling in handling the defense does not require that the conviction be set aside, unless the bungling was so obvious during the trial that it became the duty of the judge or the prosecutor, as "officers of the state," to observe and correct it.

Why this distinction? It rests on the theory that a criminal trial is a sort of game or sporting event, in which the prosecutor is the player for the government, with the defense lawyer as the player for the accused. According to this theory the government is not entitled to win if its player, the prosecutor, deliberately committed a foul (as, for instance, if he knowingly used perjured testimony). If so, and the government wins the game—gets a conviction—it loses its victory, and the conviction is vacated, just as a prize fighter loses if he knocked out his adversary by a blow below the belt.

Now when the defense counsel is appointed by the judge, the state is responsible for his acts, since he, as a special officer of the state, counts as a player for the state. If he grossly bungles the defense, the state, through him, has dealt the defendant a foul blow. When, however, the accused selects his lawyer, that lawyer is the player for the accused in the game called a criminal trial. His serious blunderings can be considered foul blows on the part of the state only if they were so patent that in the course of the trial the state's official representatives must have observed them.

Some courts reject this theory. They hold that the gross incompetence of the defense lawyer, whether or not the accused selected him, means that the accused actually was deprived of assistance of counsel, and had no fair trial. On this view it does not matter whether the lawyer's grave blunders were obvious at the trial. Suppose, for example, that the defendant's lawyer, because of his ignorance of his legal right to call such witnesses, did not call available witnesses who would clearly have established an alibi. Suppose neither the trial judge nor the prosecutor knew that such was the reason for the defense counsel's failure to call those witnesses. In cases of that kind, if the lawyer's ignorance is later disclosed, some courts will vacate the conviction. They say that the government must take the responsibility for having licensed an inordinately stupid man to practice law, and that the accused could not be expected to recognize that a lawyer, licensed by the government, is a dolt. Any other conclusion has this effect: A man is to be punished for the crime of mistakenly selecting a poor lawyer.

Within the past year, a distinguished public prosecutor remarked that a conviction of an innocent man is a "rare exception." The cases described in this book, together with earlier cases reported by Borchard in 1932 in his great book, *Convicting the Innocent*, will alone serve to show that the number of known cases of that kind is not inconsiderable. But what of the undiscovered cases? No one can possibly learn how many an innocent is now is prison, or died in the government's electric chair or gas chambers, for want of a disclosure that he did not commit the crime.

Why? There are many reasons. Once a man has been sentenced, a prosecutor, proud of his victory—which will help to build his reputation and advance his political ambitions—may resent efforts to reopen the case. Some judges, too, strongly incline against reopening cases.

The convicted man has to prove that he was guiltless. As he is locked up in the penitentiary, he must rely on others to engage laboriously in procuring that proof; that task may call for large expenditures of money, and he may be in poverty.

If you remember, Majczek and Marcinkiewicz were set free only because, thanks to the persistence of Majczek's heroic mother and two diligent newspapermen, the perjured testimony was finally exposed. Those who testified against a man in prison are usually not willing to admit that they erred or lied. Evidence of his innocence may turn on the remote chance that another man will confess.

So the fact that there are relatively few cases where the punishment of an innocent has been established does not at all signify that convictions of the wrong men are a "rare exception." Ask yourself whether any insurance company (except at a prohibitive cost) will, just before trial, issue a $100,000 policy ensuring an innocent accused person against his conviction.

If the sentence was death, and the convicted man has been executed, seldom will anyone bother to vindicate him. To do so will not bring him back to life, and the courts generally hold that his family have no standing that enables them to have his conviction set aside for the sake of his memory and the family's feelings. So the least likely instances of unconvicting the innocent are those in which they went to their death. Who is to say that such cases are "exceptional"?

In good faith the distinguished prosecutor who asserted that wrongful convictions of the guiltless are highly infrequent deplored public discussion giving a different impression

because he thought that it would "create public cynicism and impair public confidence in the machinery of justice." However, some who oppose such public discussion are willing to admit in private a greater frequency of such tragedies, adding, cynically, something like this: "It doesn't matter if the wrong man goes to prison, so long as someone does, since the purpose of punishment is to deter other people from committing crimes. Obviously that purpose is just as well served if an innocent man is convicted, if only the public never learns that he was not guilty. What you call tragedy is actually useful example; it makes law enforcement an easier job. Getting excited about these mistakes is the sheerest sentimentality."

Perhaps such a cynic believes that an innocent conviction, like sudden death, is something that happens to the other guy. But would the cynic persist in his cynicism if it happened to him?

Our purpose is not merely to narrate these cases in which the state has punished the wrong men, but to suggest ways in which the occurrence of such horrible events can be reduced to a minimum. Perhaps, someday, the conviction of a man for a crime he did not commit will be as rare as a death by a falling meteorite.

But surely not if we ignore the problem or remain content with talking about it occasionally. Nor can we hope to get rid of it by "passing a law"; no law will legislate human errors or vicious motives out of existence. The solution of the problem, so far as it can be solved, requires an aroused public interest that will evoke the best possible thinking and the most arduous efforts.

Here is not merely an academic problem, or one for lawyers only. It is an intensely human problem that should be everyone's concern. A man in prison when he should not be there is brother to us all. Our aim, therefore, is to get each of you keenly interested, to stir you to a lively sense of injustice about the plight of the wrong man convicted of a crime.

The horrors portrayed in this book, however, should induce no belief that most convicts are guiltless. On the whole our system works fairly. It affords many safeguards to those tried for crime. Most trials are fair; and most men in prison are almost surely guilty. However, that fact does not justify complacency. Too many innocent men have, avoidably, been convicted, and many more will be unless we abandon smug

satisfaction about the way we now administer justice, and institute some major reforms.

On the other hand, there exist needless legal loopholes through which some guilty men escape punishment, loopholes that should be closed. But that problem is not the subject of this volume.

It may be said that reports of cases in which the guiltless have been convicted should be hushed up, not to avoid creating "cynicism" within this country, but because the communists will gleefully publicize those reports all over the globe as signs of the inherent faults of our democracy. We cannot agree. "Democrats," writes Karl Popper, "who do not see the difference between a friendly and a hostile criticism of democracy are themselves imbued with totalitarianism," for "totalitarianism cannot consider any criticism friendly." An avoidable conviction of an innocent person represents a gross departure from the American ideal of respect for the individual's dignity; and, as Daniel Bell remarks cogently, "one may be a thorough-going critic of one's society without being an enemy of its promises."

CHAPTER TWO

I. L. Southerland and Ovid G. Mathis—Ernest E. Mattice—James A. Long

1

In 1934 almost daily the press reported an armed bank robbery. The menace of such crimes of violence, or potential violence, assumed terrifying proportions in American minds: citizens had been badly hurt or killed during the commission of these robberies, and no one felt immune. Clearly a drastic remedy was necessary.

Legislation seemed one way. Many states revised their laws to make the punishment more nearly fit the crime. In Texas, for example, where the greatest number of bank robberies had occurred, a statute made the crime punishable by death in the electric chair. It was only when a federal law was passed, however, that the end of the terror drew near. On May 18, President Roosevelt signed the Federal Bank Robbery Statute. This act made the crime a federal offense if it involved a national bank or one of the many banks within the Federal Reserve System, and it authorized the F.B.I. to act in all such cases whether tried under state or under federal law.

Charlie Chaplin, Texas's most notorious bank robber, saw the signing of this statute as the doom of his career. But Chaplin determined to have one last fling despite the risks. He was in hiding out of the state, but on May 18, the day the act was signed, he returned to Texas to lay his final plans. Needing an accomplice, he chose a man named Luther Bone, noted for his skill in such affairs. Bone and Chaplin spent several weeks carefully working out their plans.

In the early afternoon of June 6, in a stolen Studebaker, the two men drove into the business section of Atlanta, a prospering Texas town. Chaplin, wearing a blue business suit, was at the wheel. Seated next to him, Bone was dressed in overalls. On the seat between them lay a large brief case. At 2:35 P.M., Chaplin parked the Studebaker beside some railroad tracks, directly across from Atlanta's First National Bank. He and

Bone alighted from the car.

It was a pleasant summer day, the kind to encourage an exchange of news among neighbors perhaps neglected in the colder months. In front of the bank stood two men thus engaged, F. M. Sterrett, a candy salesman, and Paul Dunklin, one of the bank's cashiers. They merely glanced at the apparently ordinary blue-suited man as he entered the bank.

Immediately Bone appeared. Standing in front of Dunklin and Sterrett, he whipped a revolver from the pocket of his overalls and ordered the men into the bank. They went in frightened silence. He followed them.

Besides Chaplin three other men were already in the bank: Verne Clements, the assistant cashier, Wilmer Hughes, the bookkeeper, and R. Hunt, a farmer and depositor. Bone told the five men to go behind the cóunter and lie quietly on the floor. White-faced and scared, they hastily obeyed.

The bandits worked fast and efficiently. They emptied the contents of the cash drawers into the large brief case. On Bone's demand Clements opened a compartment of the vault. Helplessly Clements then watched Bone and Chaplin remove the valuables it contained and stuff them into the brief case.

The robbers then ordered their victims into the vault, so that none of them could sound the alarm before the getaway. Locking the vault, the bandits fled.

About an hour later the anxious captives, having found some tools inside, managed to free themselves. Immediately they sounded the alarm.

The bank robbers had stolen approximately $12,000—$5000 in cash—four diamond rings, and some government bonds. The amount of the theft was alone enough to arouse popular indignation; the terror of the bandits' victims also had its contagious effect on the community. There was great pressure on police officials to solve the crime speedily.

Since a bank robbery now came under the jurisdiction of the F.B.I., that agency was notified, although it was decided that the case would be prosecuted in the state court. The police also called in the Burns Detective Agency. The bank, working independently, engaged a man named Burton, once a Texas Ranger, to find the criminals.

From the witnesses to the crime the investigators obtained a full description of the criminals: the man wearing the blue suit, the witnesses said, was stocky, had dark and curly hair, and was the shorter of the two; the man in overalls stood

about six feet, had blond hair, prominent cheekbones, and a sallow skin.

Atlanta's citizens, the police, and other investigators were solidly united in their determination that the criminals be caught, and speedily. Only when the robbers were behind prison walls would the community feel safe.

In 1934, I. L. Southerland, a married man of thirty-four, lived in Little Rock, Arkansas. He owned his own printing business, but apparently it did not bring in an income sufficient to support him and his family comfortably. He had decided, in 1934, to look around for some additional business enterprise. He had managed to save a little money over the years and had accumulated just about enough to take advantage of any modest opportunity that might present itself.

Late in May of 1934, Southerland heard of two such opportunities, one in Texarkana, Texas, the other in Shreveport, Louisiana. Each town was within easy traveling distance of his home.

Not until early June, however, was he free to make the trip. On June 5, the day before the Atlanta crime took place, he drove to Texarkana.

Accompanying Southerland were Ovid Mathis and a mutual friend, Opal Garner. Mathis, then twenty-seven years old, was the son of a prominent Methodist minister who had been invalided for some years. Mathis supported his parents from the earnings of a cleaning and dyeing establishment he owned.

Southerland's business in Texarkana took only a short time, for he soon found out that the opportunity he sought was not there. He and his traveling companions retired early in order to be ready for the day ahead, in which they planned to drive to Shreveport.

The three arrived there about noon the following day. Southerland had an appointment with a man named John Davis, manager and owner of the DuLuxe Cafe. Davis was looking for someone to whom to sell a share in the café and, while he and Southerland discussed the terms, Mathis and Miss Garner paid a social call. When they returned, it was agreed that the four of them eat lunch at the café. They finished lunch about 2 P.M., thirty-five minutes before the bank robbery took place in Atlanta, about twenty-five miles away.

At three o'clock on the afternoon of June 6, while the men locked in the Atlanta's bank vault were still trying to escape,

Southerland, Mathis, and Miss Garner started their trip back to Little Rock.

Burton, the former Texas Ranger hired by the bank, together with Clements, the bank's assistant cashier, one of the witnesses to the crime, traveled through the Atlanta area in search of the criminals. One of their trips took them to Little Rock. There, on August 13, they chanced to see Southerland on the street. To Clements, Southerland looked like the bank robber who had worn the blue suit. Immediately Clements identified him. Burton took Southerland to state police headquarters.

Since Mathis had accompanied Southerland on his June 6 trip, the police also brought him to headquarters. Clements identified him as the robber wearing overalls. The two men were held for questioning. They denied knowledge of, or participation in, the crime.

But, after negotiations between the Atlanta and Arkansas state police were complete, the suspects were brought to Atlanta, charged with the robbery of the First National Bank.

Southerland and Mathis continued to assert their innocence, pointing to their alibis. But Clements had been very sure, and now the suspects were confronted by the other victims of the crime.

Southerland and Mathis must have felt that their ordeal was near its end when they heard what the salesman, Sterrett, said: "I had to look down into that robber's face. This man Southerland is half a head taller. The second robber was nearly six feet tall and he had light hair and a sallow complexion. Mathis has light hair, all right, but he's only five feet seven. And he doesn't have the prominent cheekbones, either. I tell you, you've got the wrong men."

Dunklin, one of the cashiers, did not identify the two men. But Hughes, the bookkeeper, agreed with Clements that Southerland and Mathis were the bank robbers. The farmer, Hunt, was also sure.

Although the suspects had an alibi that three witnesses supported and although they did not fit the physical description of the robbers given directly after the crime occurred, yet three eyewitnesses said that they were the bank bandits. That evidence sufficed to enable the prosecutor to get an indictment and go to trial. That the observation of the state's witnesses had probably been much distorted by their natural fright while the robbery was taking place is not the sort of fact that many prosecutors weigh, since they can reason that

the credibility of the witnesses is for the jury to decide. Indeed, the prosecutor no doubt believed that Southerland and Mathis were the guilty men.

The accused pair were indicted and tried separately. The trial of Southerland came first.

The prosecution put Clements, Hughes, and Hunt on the witness stand. Convinced that they were correct, their testimony proved unshakable: they swore that Southerland was one of the criminals.

Southerland's testimony opened the defense. He swore that he had been nowhere near the scene of the crime when it occurred. Then Davis, the café owner, testified that Southerland had been with him in Shreveport when the crime was taking place. Next Opal Garner testified that she had accompanied the defendant on his trip of June 5 and 6, and that he had not been in Atlanta on those dates. A Mrs. Perry swore that Mathis and Miss Garner had visited her on the afternoon of June 6, evidence that corroborated Opal Garner's testimony. Sterrett testified that he had witnessed the robbery, and that Southerland did not participate.

The jury, believing the defense witnesses were mistaken, or had lied, convicted Southerland.

Mathis's trial followed the same course. The prosecution produced the identifying witnesses, and Mathis presented his alibi, supported by the same witnesses who had testified for Southerland. The jury brought in a guilty verdict.

Each prisoner was sentenced to the state penitentiary, Mathis for thirty, Southerland for fifty years.

There was still the chance that the judgment would be reversed in the Supreme Court of the state. But the prisoners now found themselves without the necessary funds for an appeal, since their savings had been exhausted by the cost of their defense. However, a Texas lawyer, convinced that they were innocent, represented them on their appeals without a fee.

Whatever the hopes of the convicted two, they were short-lived. The Texas Supreme Court reviewed the case, concluded that the trials had been conducted properly, and, in an opinion handed down on April 25, 1935, sustained the judgment of the trial court. Early in May, because the jury had believed the wrong witnesses, Southerland and Mathis began their prison terms.

After their numbers and their cells had been assigned, the prisoners were put to work, Mathis on the prison farm, Southerland, because of his civilian skills, in the penitentiary print shop.

Captain Barnett, the shop superintendent, and Southerland worked together closely, and soon a friendship developed between the two. Southerland told the superintendent the story of his trial, assuring Barnett that he and Mathis were innocent. Although Barnett must have heard many such assertions from many other prisoners, he believed this one. Convinced by the trial testimony of the defense witnesses, Barnett determined to do everything in his power to help Southerland and Mathis prove their innocence.

Barnett wrote to each of the defense witnesses, asking for affidavits about the prisoners' alibis. The witnesses responded eagerly, each repeating in his affidavit what he had testified in court.

About that time Luther Bone, Chaplin's accomplice in the Atlanta robbery, was convicted of another crime and sentenced to the state penitentiary. Barnett suspected that Bone had been one of the bandits in the bank robbery, for he fitted the physical description of the robber and his criminal record fitted the pattern of the crime.

Barnett took up the matter with the F.B.I. He found that several of the government agents agreed with him that the convicted pair were innocent and that Bone was guilty. More, these agents believed that the notorious Chaplin was the master criminal, as the robbery had been conducted in his inimitable style.

Here Chaplin himself took a hand in clearing the prisoners. Outraged, he later said, by their conviction, and in need of cash, he decided to re-enact the crime of 1934 so that the police would get the point.

On August 31, 1936, nearly one and a half years after Southerland and Mathis began their prison terms, Chaplin, aided by two accomplices, once more robbed Atlanta's First National Bank. As before, during the robbery, they compelled those in the bank to lie helpless on the floor. As before, the robbery complete, the bandits locked their victims in the vault.

However, this time Chaplin did not escape. One of the victims, unnoticed by the robbers, had managed to flash an alarm. When Chaplin walked into the street, the police lay in wait for him. A short gun fight ensued, during which Chap-

lin received a bullet wound. The police captured him and one of his accomplices. The third robber escaped.

When F.B.I. agents arrived at the county jail where Chaplin was being held, he confessed to the first and second robberies of the Atlanta bank, insisting that Southerland and Mathis were innocent.

The F.B.I. agents sent for the five witnesses to the first crime. Sterrett immediately recognized Chaplin as one of the men in the 1934 Atlanta robbery. Dunklin, who had not identified either of the innocent men, did not recognize Chaplin, as he said that he had never seen the bandits at close range. Hunt, the farmer, said that Chaplin had been one of the bandits in the bank.

Clements and Hughes, however, did not recognize Chaplin as one of the bank robbers. These witnesses still thought Southerland and Mathis the guilty men. For that reason the state did not release the prisoners.

Chaplin went to trial for the second Atlanta bank robbery, was convicted, and sentenced to the state penitentiary. In prison he freely discussed the details of the first robbery, expressing his indignation that Southerland and Mathis had not been released.

"That's the main reason I went into the bank again," he said. "I tried to do everything in the second robbery just like I did the first time, so those bankers would surely recognize me and free those other boys."

Because the state officials did not intend to free the "other boys," Barnett prevailed upon Luther Bone to confess to his participation in the first robbery. In a written statement Bone detailed the facts of that crime. On the basis of Chaplin's and Bone's confessions, the federal grand jury indicted the two men for the 1934 robbery of the Atlanta bank.

The state, however, disregarding the belief of F.B.I. agents and the federal prosecutor that Bone and Chaplin, not the other prisoners, had held up the bank in 1934, continued to protest the release of Southerland and Mathis. The prisoners, taking matters in their own hands, sent a record of the evidence, compiled by Barnett and the F.B.I., to the Texas Board of Pardons, requesting a review of their case.

The three members of the Board decided to do nothing about the matter until they knew the outcome of Chaplin's and Bone's trial. But that trial was never held: Chaplin escaped from the penitentiary. The Board still did not act on

the petition from the prisoners.

Soon, however, the Board received insistent demands to proceed. A special F.B.I. agent wrote a digest of the case, asking that the prisoners be pardoned. An attorney for a nationally known magazine, *True Detective* (which had devoted several issues to the prisoners' cause), visited the Board on behalf of Southerland and Mathis. The state requested a Board hearing.

The Board granted the state's request. At the hearing both sides presented evidence. The state, arguing that the prisoners' innocence had not been proved, presented the two witnesses who still identified Southerland and Mathis. The prisoners offered the confessions of Chaplin and Bone, and the two witnesses who had identified Chaplin as one of the bank robbers.

Two of the Board members, after carefully considering the evidence, and persuaded that Southerland and Mathis were innocent, voted for their unconditional pardon. The third member, after carefully considering the same evidence, and certain that the prisoners were the guilty men, dissented.

Texas's Governor Allred bridged the gap created by the split decision of the Board. On November 7, 1938, four years after the prisoners began to serve their terms, he conditionally pardoned them: They were released, but on parole. That meant that they were required to report regularly to the Parole Board, still had no civil liberties, and must live with a prison stigma on their names. Only in the next election year, when a new governor took office, did Texas fully acknowledge its mistake. As one of Governor O'Daniel's first official acts, he granted Southerland and Mathis unconditional pardons. But no human act could restore their four lost prison years, nor add those years to the remainder of their lives.

* * * * *

The year was 1936 and in that year twenty-two-year-old Margaret Cyckose, a widow with two small children to support, lived in Denver, Colorado, where late at night, in October of that same year, several rapes and attempted rapes had taken place. The crimes received wide coverage in the press, the criminals were still at large, and few of Denver's residents escaped panic after dark. Mrs. Cyckose was no doubt as anxious as any woman in the neighborhood but, as she worked as a waitress in an all-night restaurant, she had no choice but to brave the dark alone, for her working day ended at 2 A.M.

At that early hour on October 17, 1936, Mrs. Cyckose left the restaurant, as usual, and started her walk home in the deserted city streets. She had just reached the corner of Fox Street and West Colfax Avenue, and was about to cross the street, when a car pulled over to the curb. The street corner was well lit, and Mrs. Cyckose saw that there were two youngish, clean-shaven men in the automobile. The driver, rolling down the window, asked her the best way to get to Fourteenth Street. She must have felt the first dread then, but she gave him the directions for which he asked. The man, however, did not drive on; instead he invited her to accompany him and his companion on a ride.

Seeing her hesitate, perhaps trying to decide whether to stand her ground or run, both men alighted from the car. Then Mrs. Cyckose tried to run, but too late. The men moved in on her, dragged her to the curb as she fought and screamed, and forced her into the front seat of the car. No one heard Mrs. Cyckose scream or, if someone did, perhaps he waked, but, deciding in that sleepy instant that the sound derived from a disturbing dream, turned to a new dream, and the men drove off with their victim, paralyzed in mute terror now, pinned between them on the front seat.

Several hours later passers-by found Mrs. Cyckose on the sidewalk near her home. The men had brought her back, pushed her from the car, and left her lying there. Her nose was broken, her whole face pounded to a swollen pulp. To the police, immediately notified, she painfully told her very nearly incoherent story of the assault and rape on the lonesome Colorado prairie in the early morning hours of that mild October day.

The police, now thoroughly aroused, redoubled their efforts to find the rapists still roaming Denver's streets.

Late the next evening, on October 18, two frantic parents arrived at police headquarters. This couple's two young daughters, out for an early evening walk, had been approached by four men in an automobile who asked if the girls wished to accompany them to a party in a town nearby. Heedless of the danger, the girls accepted. At the party, however, one of them suddenly had qualms about having let herself be picked up by these strange men, left the party, and returned home alone. There she told her parents of the incident. A little later her sister returned, unharmed.

Despite the fact that the girls had not been molested the parents insisted that the police take action against the men.

The only clue they had to offer was the name of the driver of the car, Ernest Mattice. The police immediately got out a warrant for his arrest.

Mattice was, in 1936, approaching his middle thirties. Born in Canada and educated there, he came to the United States in his early youth, married here in 1929, and in 1936 was divorced.

Perhaps for business purposes, to make him look older than his years, or possibly merely because he fancied one, Mattice wore a large mustache.

In October 1936, Mattice came to Denver on a business trip. He stayed at a commercial hotel where, on the night of October 16, a few hours before the rape of Mrs. Cyckose occurred, he asked the desk clerk to call him at six the following morning. (Later, at his trial, the clerk testified that Mattice had been in his hotel room at that hour and had received the call.)

By a routine check of the hotels the police easily traced Mattice. They took him into custody, charged with attempting to corrupt the morals of two girls who were under age.

The police decided to call the rape victims to headquarters to confront Mattice, on the theory that he might be one of the criminals in the cases still unsolved. Only one victim identified Mattice. Mrs. Cyckose immediately said:

"That is the man."

Mattice had an alibi that, had it been investigated then, would immediately have proved him innocent, as would the investigation of other sources of information available to the police. But a witness had identified Mattice, and the prosecutor no doubt believed that the witness told the truth. He presented the case to the grand jury, which indicted Mattice for rape, conspiracy to commit rape, kidnaping, and conspiracy to commit kidnaping, and late in December 1936 he went to trial. It was now up to him to prove his alibi.

The prosecutor called Mrs. Cyckose to the stand. Pointing to Mattice, she said, "This is the man who did those things to me."

Mattice, protesting his innocence, testified that he had been in his hotel room, asleep, when the rape occurred. The desk clerk took the stand and swore that Mattice had answered the phone at 6 A.M.

But the crime had been committed shortly after two. Probably unaware that it was physically impossible for him to

have committed the crime, miles away from his hotel, and return to his room by 6 A.M., Mattice offered nothing more to bear out his alibi.

Considering the contrast between the evidence for the prosecution and that for the defense, the desperate Mattice perhaps felt no great surprise when the jury, after an hour's deliberation, returned a guilty verdict.

A week later the prisoner stood before the trial judge for sentencing. The judge asked him if he had anything to say before sentence was pronounced.

"I am entirely innocent!" Mattice said despairingly. But usually the same words are spoken by a guilty man.

"The court has given this case a good deal of thought," the judge said. "The prosecuting witness, Margaret Cyckose, is not mistaken in her identification . . . This defendant had a fair and impartial trial . . . You are one with the heart of a wild beast."

The judge then sentenced the prisoner: On each of the first two counts of the indictment Mattice was to serve two life sentences, to run concurrently; on each of the second two the sentence was seven years consecutively.

The harshness of the sentence caused six of the jurors who had sat at Mattice's trial to join in a petition stating that they regretted their verdict, and asking the judge either to suspend sentence or to grant Mattice a new trial; and Mrs. Cyckose, although not appealing directly to the judge, publicly stated that she considered the sentence much too severe. But the trial judge, unmoved, ignored these pleas.

On January 4, 1937, Mattice arrived at the state penitentiary, a lifetime ahead in which to contemplate eternity.

A few months after the trial Cooney and Williams, officers on Denver's police force, began to doubt Mattice's guilt. Their theory of his innocence rested on these facts: In each of the recent rapes, including Mrs. Cyckose's, the rapists had abducted the victim in a stolen car, which had been started, not with an ignition key, but by crossing the ignition wires. Later the cars had been abandoned on some city street. After Mattice's conviction three more rape attempts occurred, and in each case the police soon found an abandoned car in the same district where the attempt had taken place. In each instance the car's ignition wires had been crossed. Cooney and Williams, reasoning that the same men had committed all the

rapes and rape attempts, were certain that Mrs. Cyckose's assailants were still at large.

It was an open secret on the force that two brothers, Frank and Robert Neill, were car thieves. Cooney and Williams thought the time had come to arrest the brothers on suspicion of robbery, on the urgent possibility that they were the rapists. But, before they took that step, the officers consulted Police Detective Lee Raedel, also dubious about Mattice's guilt.

Raedel, working on the same theory about the Neills, showed Cooney and Williams the rogues' gallery photographs of Frank Neill and Mattice.

"Take a good look at the profiles of these two," Raedel said. A casual inspection showed a startling resemblance.

But Raedel thought it wiser to obtain more facts to support the theory of Mattice's innocénce before picking up the Neills.

The three officers, probing further, learned that, in her report to the police who brought her to headquarters after the attack, Mrs. Cyckose had described her assailants as clean-shaven men. This was a fact perhaps not known by the officers who arrested Mattice two days after the rape occurred, at which time he had been wearing a thick mustache.

Cooney, Williams, and Raedel now checked Mattice's alibi by driving several times to the prairie where the rape occurred and then back to town, clocking the trip each time. This check proved that Mattice could not have made the trip, much less committed the crime, and returned to his hotel by 6 A.M., the hour when he received the desk clerk's call.

With Mattice's innocence clear to them, but thinking that they might need more conclusive evidence to convince higher authorities, on June 16 the officers arrested Frank and Robert Neill on suspicion of robbery. Concentrating on Frank, the brother who looked like Mattice, Raedel closely questioned him.

At first stubbornly unwilling to respond, eventually Frank, obviously feeling the intense relief confession often brings, admitted that he had raped Mrs. Cyckose. With the police stenographer taking down his words Frank reported the grim details of his criminal attack. He also supplied facts about the crime the police had not known before. He refused, however, to reveal the name of his accomplice.

But a few hours later, after he had time to realize the consequences of his guilt, Frank repudiated the confession he had

made. Raedel subjected Frank to further intense questioning, and Frank confessed again. After another interval, with more time to think, Frank retracted his confession for the second time.

Raedel, although reluctant to bring Mrs. Cyckose back into the case to be reminded of the suffering she had endured, could think of no other way to prove the truth, for it seemed clear that Frank would continue to shift his ground.

Mrs. Cyckose had left Denver shortly after Mattice's trial, with no forwarding address. Raedel finally traced her to Gunnison, Colorado, where she had gone with her children, changed her name, and found a job. On June 24, Raedel sent a police car to bring her back. When she learned that her return to Denver might clear Mattice, she agreed.

At police headquarters Mrs. Cyckose instantly picked Frank out of the line-up. "That is the man," she said. "I was mistaken before. He looks like Mattice but it was not Mattice, I know that now."

Raedel asked her again to describe the crime. Mrs. Cyckose, in telling of the rape this time, added details she had not initially revealed. Her account matched Neill's confession down to every last repudiated detail.

But Neill, confronted with Mrs. Cyckose's statement, still sulkily denied his guilt. It was Mrs. Cyckose who finally got through to him.

"You have told things only you and I could know," she said. "You know you are the guilty one and, knowing that, you can't let an innocent man stay in the penitentiary."

Either Neill's lethargic conscience was finally aroused or he realized that the game was up. He confessed for the third time, and this time the confession stood. He also named his accomplice in the crime: Earl Arthur Parker, then in the state reformatory. Raedel sent for Parker; Mrs. Cyckose immediately recognized him. Mattice's vindication was now complete.

Six months after he had been convicted for a crime in which he played no part, Mattice was pardoned and released. Four years later the state granted him $4000 as compensation for his "false arrest, conviction and imprisonment," an error resulting from the heightened feelings of the community, which lent credence to the anguished victim's terrible mistake.

* * * * *

In 1934, March 24 fell on a Saturday. On the evening of that Saturday, in Chicago, Illinois, two Walgreen pharmacies were robbed by two armed men.

At 10:30 P.M., the robbers entered the first of these drugstores, on the corner of Lawrence and Damen avenues. The manager and two other employees were the store's only occupants at the time. While one robber held his gun trained on the three men, the other robber took the money from the cash register. The gunmen got away. They drove to the second pharmacy, about four miles distant, at the corner of Granville and Winthrop avenues. When they entered it, at 10:45 P.M., only the manager and three employees were in the store. The criminals, using the same method as before, took the money from the cash register. Again they made their getaway.

The evening following the robberies two young men, George Wilch and James Long, sat in a tavern, the Ball of Fire, enjoying a few drinks. At that very moment an anonymous informant was phoning a nearby police station. He told the policeman who took the call that the Walgreen bandits were in the Ball of Fire and could be identified by their blue Ford coupé, parked outside.

Long and Wilch, finished with their drinks, left the tavern and started toward their blue Ford. They found two policemen standing by its side. The officers arrested Long and Wilch, charged with the Walgreen robberies.

The robberies had been witnessed by seven people, the employees of the two pharmacies. Summoned to headquarters and asked if Long and Wilch were the criminals, each of the seven said that they were.

The grand jury indicted Long and Wilch. They were brought to trial before Judge McKinley in the criminal court of Cook County. The prosecution rested its case on the identifications by the seven witnesses. Each defendant offered an alibi.

Wilch called a waiter, Richard Thrush. Thrush testified that, in the restaurant where he worked, he had served Wilch dinner at the time of the robberies. Immediately after Thrush left the witness stand, the prosecutor asked Judge McKinley for a short recess.

During this recess the prosecutor, believing that the witness had lied, had him taken into custody and questioned him at length. Thrush now confessed to perjury. He did not know where Wilch had been when the robberies occurred.

Thrush took the stand again, this time as a witness for the state. He repudiated his former testimony, leaving Wilch without an alibi.

In this unfortunate setting, directly after this new testimony from Thrush, Long's alibi witness testified that Long, innocently occupied, had been with him at the time of the two robberies. Cross-examination did not shake the witness's testimony.

The case went to the jury. After deliberating for two hours they returned a guilty verdict against both the men on trial. Judge McKinley sentenced the convicted pair to the Joliet State Penitentiary, each for a term of from one year to life.

Two weeks later the informant who phoned the original tip to the police concerning Wilch and Long again anonymously phoned the police. This time he said that his previous information had been wrong. He had just seen Edwin Brethauer, a notorious criminal, on the street. He said that he now thought that Brethauer, not Long, had been Wilch's accomplice. But the police, although now somewhat doubtful of Long's guilt, decided to let well enough alone.

Shortly after the second anonymous phone call a new series of holdups occurred on Chicago's North Side, among them the robbery of the Ricketts Restaurant, where George Wilch had once been employed. During their investigation of this new crime the police arrested Brethauer. Before the arresting officer had stated the charge against him, Brethauer heatedly remarked:

"I suppose that son of a bitch squealed on me!"

Asked whom he meant, Brethauer replied, "George Wilch." Further questioning revealed that Brethauer had been Wilch's accomplice in the Walgreen robberies.

The police now had the evidence against Brethauer necessary to bring him to trial; they could let the jury decide whether his admission proved his guilt. But, to prove Long's innocence, the police had to make sure that Brethauer's statement was based on fact.

They took Brethauer to the two Walgreen drugstores. Although each store had been redecorated since the robberies, Brethauer accurately described, in great detail, what the previous layouts had been. He also reported where each victim had stood during the robberies, and exactly what each had then said. He also remembered that, during the first robbery,

an alarm clock had sounded, a fact not previously mentioned, but one that two witnesses recalled when later questioned.

In June of 1934, Judge McKinley held a new hearing. The seven witnesses, who had testified for the state at Long's trial, testified again. Each stated that he had been mistaken at the trial: Brethauer, they now said, had been Wilch's accomplice. Brethauer testified that he had participated in the crimes. The prosecutor joined with Long's attorney in a petition asking Long's release.

Judge McKinley set aside Long's conviction and ordered a new trial. The prosecutor then stipulated that the testimony taken at the hearing should stand as the record for the new trial. Judge McKinley acquitted Long.

Before he adjourned court, Judge McKinley said to Long:

"If you're wise, you'll go out of here feeling that you were unjustly imprisoned, perhaps, and that it's unfortunate, but that it was an honest mistake, and that no animus was shown against you by any witness or officials."

A year later, in June 1935, the Illinois House of Representatives passed a bill granting Long $12,000 as compensation for his ordeal. A month later the state Senate concurred. But Governor Horner vetoed the bill. It has been suggested that the Governor thought the sum too large.

James Long's only compensation, then, consisted of the court's acknowledgment that an error had been made, a perhaps unavoidable mistake. But there is also the possibility that, if the police had conducted a more intensive investigation of the clues and background of the robberies before any suspect was brought to trial, they might have realized that Long was innocent.

2

Perhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions. In many such a case the witness lied, sometimes at the prompting or with the knowledge of the police or the prosecutor. More often, however, the witness made an honest error. Southerland and Mathis, Long and Mattice, each went to prison, not because the witnesses lied, but because they were mistaken. Here we come on the greatest obstacle to the prevention of such courthouse tragedies.

"An analysis of the testimony of 20,000 persons who were asked to describe the physical characteristics of the man they

saw commit a crime," wrote an experienced lawyer not long since, "revealed that, on average, they overestimated the height by 5 inches, the age by 8 years, and gave the wrong hair color in 82% of the cases." So it is that in hundreds of cases honest witnesses, with complete assurance, have identified the wrong men, but fortunately for most defendants each of them was able to offer irrefutable evidence that he was in some other place at the time of the crime's commission. The tragic cases are the ones, like that of Mattice, in which, to counteract the testimony of the identifying witnesses, the defendants have no such clear alibi evidence, or, as in the case of Southerland and Mathis, the jurors disbelieve the alibi testimony.

Could such honest mistakes be exposed during investigation before the trial? Yes, in many instances. It is well known that, because of disturbed emotions at the time of the crime, the victim of a rape or robbery is most likely to be an inaccurate observer of what then went on. Consequently the police and the prosecutor, when investigating the crime, should treat with the utmost caution the victim's description or identification of the criminal. They should searchingly question the victim. There are known methods, by no means perfect, to test a prospective witness's probable accuracy as an observer, his ability to see and hear, and the reliability of his memory. The police ought to give the most careful attention to the alibi asserted by the suspect.

A person who eyewitnessed the crime, when he first talks to the police, may have no clear recollection of the man he saw. The police and prosecutor may work on the eyewitness by subtle and repeated questions until he loses his initial uncertainty about a suspect and finally, without hesitation, declares him the man who did the deed. Then, at the trial, this eyewitness testifies so positively that cross-examination does not create any doubt in the jury's mind, and they believe the witness's testimony that the defendant was the culprit.

In fairness to the police and prosecutors it must be said that this witness-coaching is often inadvertent: The questions they put to an eyewitness may act on him suggestively; he may want to be helpful in catching a criminal or he may give himself a feeling of importance as a prospective witness at an important trial. By the time of trial his initial doubts about the defendant's identity have vanished.

Despite the utmost precautions we do have cases where an honest witness mistakenly testifies at the trial, "That is the

man," and the jury, believing that testimony, convicts an innocent person. This has happened more often than it is comfortable to contemplate. No one has contrived any method of preventing such erroneous convictions. Nor have we any means of insuring that subsequently the mistakes will be discovered and rectified. There are, then, unavoidable injustices of this sort.

One suggested way of eliminating such fatal mistakes is this: Never allow a single witness to give testimony, at the trial, identifying the accused, but always require that at least one other witness corroborate such testimony. That remedy has an obvious weakness. In a holdup or a rape no one was present except the criminal and his victim; consequently, in such a case, no criminal could be convicted if the victim could not, in court, testify as to the identity of the accused.

Witnesses are human and therefore fallible. They may be honestly mistaken in what they saw or heard, mistaken in their subsequent recollections of what they saw or heard, mistaken in testifying in court about their recollections of what they saw and heard. Unconscious prejudices may induce or augment those errors. Human observation, at best, is faulty, perception blurred in memory. And if a witness sees and hears through the glare of anger or the haze of fear, the chances are good that he mis-sees and mis-hears.

A witness who did see an assault may yet be wrong about who committed it. When he appears as a witness, he is reconstructing what happened in the past. His reconstruction, because of his faulty observation, may not match the real event, may not, because of his faulty memory, even match what he then observed. His testimony, at best, is nothing but his belief about the fact, and that belief may be a false belief. Suppose that, at Sam Williams' trial for assaulting Mrs. Mary Smith, a bystander, Helen Robinson, testifies, "I saw Sam Williams hit Mrs. Smith." The witness, Helen Robinson, may be thoroughly honest but wholly wrong. To understand what may be the fateful effect of her error on Williams, we must understand the function of the jury.

When an accused is on trial, the jury has the task of determining the facts bearing on his guilt or innocence. Those facts—such as the acts of the accused—always happened, of course, in the past, before the trial. The facts are therefore past events; they are history. They do not walk into the courtroom. The jury can never see or hear them happening,

and has to reconstruct the past. It does the job of a historian: Like a historian, it can learn of the past events only at second hand. This it does by listening to the witnesses for the government and the witnesses for the accused. In other words, the jurors can see and hear the facts only indirectly—through the eyes and ears of other persons, the witnesses. Usually the stories of the witnesses for the two sides contradict one another. The jurors, accordingly, must decide which witnesses are accurate and reliable, must make a choice of which witnesses are to be believed. If witness Helen Robinson testifies, "I saw the defendant slug Mary Smith," and the jurors believe Miss Robinson, that testimony becomes a fact for the jury, even if actually the defendant had not slugged Mrs. Smith. In the same way, if witness White testifies that, at the time Mrs. Smith was slugged, the defendant was with White in another city, and the jury believes White, then his testimony becomes a fact for the jury, even if actually the defendant had slugged Mrs. Smith. That is, the jurors have to guess which witnesses have told the true story. So the facts of the case, on which the jurors base their verdict, for or against the accused, consist of nothing more than the jurors' guesses about the reliability or unreliability of the witnesses. There is no assurance that the jurors will guess correctly. They may believe witnesses who lie or are honestly mistaken. But the fate of the accused depends entirely on the jurors' guesses, right or wrong. It follows that, where an innocent man is on trial, a mistaken witness who does not lie may be, for the accused, a lethal or dangerous weapon, causing his death or incarceration. (In Chapter Eight, we discuss witnesses' errors in more detail.)

By no means do all wrongful convictions, then, stem from deliberate misconduct by police or prosecutors. But there are cases where official negligence accounts for the failure to discover those mistakes of witnesses that bring about such convictions. For, as the reliability of the witnesses' testimony is the pivotal factor when once the accused is on trial, it is peculiarly important that, before a suspect is indicted and tried, the police and prosecutor, in investigating the crime, should take all possible pains to make sure that any witness who accuses the suspect is reliable. Unfortunately that sort of investigation is not always made.

Almost all of us tend to be impatient in solving any problem that confronts us in everyday life. Suspended judgment is painful. A problem causes a conflict; an unresolved conflict

leads to anxiety. Doubts create a tension, sometimes unbearable. We are loath to admit that some problems are insoluble. So we rush to a conclusion, then stubbornly cling to it, disregarding all facts contradicting that conclusion. This characteristic has its counterpart in the way we stick to our partisan political judgments: We stress all the facts favorable to our candidate and manage to forget the unfavorable.

Policemen investigating a crime inevitably share this all too human tendency, especially when the public, in a state of panic fear, full of anxiety excited by a dastardly crime, indignantly clamors for the quick detection of a dangerous criminal. Especially under such pressure do the police grow eager to solve the problem and become impatient to solve it promptly, unwilling to admit that the available solution may be the wrong one, that they cannot find the criminal. The public wants vengeance, demands a victim of its vengeance, and one must be found without delay.

See what sometimes happens: A bank has been robbed, its cashier murdered. A bystander reports to the police that he saw William Jones commit the murder. Having thus found a suspect, the police sedulously run down all clues that seem to incriminate William Jones. They piece together these clues and jump to the conclusion that he is their man. They overlook other clues that might exculpate Jones or inculpate someone else. They brush aside facts inconsistent with their theory of Jones's guilt. In this they are not dishonest. For here pride and prejudice operate: Pride in their theory is buttressed by prejudice against any other. Said former U. S. Attorney General Homer Cummings of a famous case, "The police found their suspect and then proceeded to search for the facts to fit him."

What can so easily happen in such circumstances, and how easily it could have been avoided, too, are strikingly illustrated in the case of Ernest Mattice. If the police had been as diligent in uncovering the facts before his conviction as they were afterward, the chances are that he never would have gone to trial. But the witness said that Mattice was the guilty man, the police were glad to close the file, the prosecutor had a case for trial, the public zeal was satisfied, so off went Mattice to prison.

This impatient, careless method of inquiry, usually forgivable in ordinary affairs, can lead to tragedy in crime detection. Only tentatively should the police at the outset adopt any theory of the crime; keeping an open mind, they should

look for evidence that will poke a hole in such a theory, explore all leads to other possible explanations. So a properly trained police will act. We have too few police thus trained. As a consequence, avoidable convictions of an innocent man may ensue.

It is true, as New York County District Attorney Hogan recently declared, that a prosecutor, too, should conscientiously run down leads suggesting a suspect's innocence. However, even a conscientious prosecutor may not know the leads the police disregarded, and, satisfied with the evidence they have gathered, he may, in good faith, cause the suspect to be indicted. The innocent accused man goes to trial, ignorant of the clues the police neglected and that would have afforded him a defense sufficient to persuade the jury of his innocence. In the absence of the missing evidence the jury holds him guilty. So William Jones becomes a scapegoat to public clamor for vengeance and to police impatience, a sacrificial substitute for the real culprit.

Francis Bacon, in the sixteenth century, warned of the dire effects of "passing an unjust sentence . . . where not only the guilty is acquitted but the innocent condemned . . . For when once the court goes on the side of injustice, the law becomes a public robber, and one man really a wolf to another." Subsequently William Paley, in the late eighteenth century, presented a different view. Speaking of innocent men sentenced to death, he said, "He who falls by a mistaken sentence may be considered as falling for his country," since he "suffers under the operation of those rules, by the general effect and tendency of which the welfare of the community is maintained. . . ." In 1849, William Best, calling this a "pernicious and inhuman argument," replied that, "when the guilty escape, the law has merely failed of its intended effect; but when the innocent become its victims, it injures the security it was meant to preserve. . . . It requires," he continued, "strong imaginative powers to see an analogy between the fate of a soldier dying in defense of his country, and that of an innocent man butchered in cold blood under the name of justice." Nevertheless Paley's contention would be cogent —if we did everything practically possible to prevent such miscarriages of justice. But everything practical has not been done. Thanks to avoidable errors, innocent men have been convicted.

If, without a trial, the government were to force a man into prison, depriving him for years of life or of his basic

liberties, the government's acts would be shockingly unlawful. But if he is convicted of a crime, the government lawfully so treats him. If, in truth, however, he was innocent, that treatment, though lawful, is equally shocking. Yet some lawyers remark, as one recently wrote, "Such a contingency does not justify condemnation of a system which is necessarily subject to human frailties, and if this complacent view exasperates a victim who has been found guilty of a crime which he never committed, he must accept this result," as he would accept an injury by a stroke of lightning. In that fashion we frequently hear such miscarriages of justice excused. That excuse would serve were every such blunder inescapable. Then an innocent convicted man, if enough of a philosopher, would accept his plight with resignation, as he would an attack of polio or a coronary thrombosis—one of life's unavoidable hazards. But such an excuse is brutally callous when the erroneous conviction was avoidable.

CHAPTER THREE

Nancy Louise Botts—Clifford T. Shephard—Jere B. Snodgrass

1

In October, 1934, twenty-nine-year-old Nancy Botts, wife of William Botts, was living with her husband in the town of Brazil, Indiana. The Bottses had been married for five months. Nancy was already pregnant and was contented with her lot. But, on the afternoon of October 12, the day on which her happiness was shattered, she had become somewhat restless and, for the moment, bored. She had finished the household tasks in her small apartment, had read the few magazines scattered on her living-room table, and felt too languid to go out and take a walk. When she heard voices in the apartment of her next-door neighbor, Marjorie Roberts, she welcomed the trivial distraction. Impetuously she decided to ring the doorbell of Marjorie's apartment. Marjorie might invite her to share whatever sociability was going on.

Marjorie did not answer the doorbell. Nancy, on terms of easy familiarity with her neighbor, turned the handle of the door, which opened to her touch. She walked into Marjorie's living room. There she saw Marjorie and three strange men confronting her. Two of the men had an astonishing reaction to her presence in the room.

"She's the woman we've been looking for!" the first man said excitedly.

"That's right!" the second man cried.

The third man reached her in one swift stride, grasped her arm, and pulled her farther into the room. Incredulous, Nancy heard him say that he was arresting her.

Later Nancy learned about the circumstances leading to this strange event.

In recent months there had been a clever criminal at work in the town of Kokomo. A young woman, usually with a

small child in tow, looking the original of the picture of domesticity, would enter a store and ask to see some merchandise. After making several purchases she would suddenly find that she did not have the cash to pay. Embarrassed, she would ask the merchant to take a payroll check and, since the check called for more than the amount she owed, to give her the remaining cash. The merchant would agree, thinking that she might become a steady customer. Invariably the check would be returned, the words "no account" stamped across its face.

The police were notified by the merchants who had been swindled but, for several weeks, made no progress on the case. Impatient, the forger's victims hired a private detective to track her down.

In the course of his investigation the detective, accompanied by two merchants from Kokomo, called on Marjorie Roberts, as several clues led to her. While they were questioning Marjorie, Nancy made her unfortunate entrance into the Roberts' living room.

The two Kokomo merchants were certain that Nancy was the criminal. Nancy said that she had never been in Kokomo.

The detective took Nancy to Brazil police headquarters. There the police questioned her for two hours. Persistently she denied her guilt. But the merchants were absolutely sure that she lied. So the police took Nancy to Indianapolis, where she was arraigned and put in jail. She remained in jail until her trial, since her husband could find no way to raise the $2500 required for her bail. Nancy lived with terror all the while. Because her body suffered, too, she lost her unborn child.

The trial opened in Kokomo in the middle of November 1934. The prosecution placed seven merchants on the stand. Each described the crime by which he had been victimized. Each testified that Nancy was the criminal.

Nancy's defense rested on her alibis. An insurance collector testified that, on one of the days when Nancy was said to have been in Kokomo, he was collecting a premium from her in Brazil. Three of her neighbors swore that they had seen her near her apartment house when the other forgeries named in the indictment had occurred.

The question of which witnesses were correct was now for the jury to decide. But there was additional evidence the jury should have had: In a forgery case a comparison of the suspect's handwriting with that of the handwriting on the

forged documents becomes vital. The prosecutor did not need such a comparison to prove guilt: The testimony of the identifying witnesses sufficed. But the defense needed that evidence, since a handwriting analysis would, in fact, have proved Nancy innocent. But probably because Nancy lacked the funds, her lawyer did not call a handwriting expert. The jury, without this evidence, which might have changed the direction of their thoughts, brought in a guilty verdict.

A week later the judge sentenced Nancy to not less than two and not more than fourteen years in the state penitentiary, while William, trying to give comfort to his stricken wife, could not think how.

During Nancy's first few prison months she alternated between active panic and passive, deep despair. Gradually, however, she regained her equilibrium. She learned to hope that eventually the truth would set her free, a hope finally realized.

In December 1936, two years after Nancy had begun her prison term, another series of forgeries occurred. The police, examining the new bad checks, realized that they had been written by the same forger for whose crimes Nancy had been convicted. This was proof more certain than had been presented to the jury. Nancy now had an alibi no one could dispute, since she was in prison when the new crimes took place. On December 16, 1936, the Governor granted Nancy an unconditional pardon.

The police caught Mrs. Dorsett, the real criminal, in the act. She confessed, claiming that her husband was responsible for her crimes, since he had coerced her into committing them.

The Dorsetts were tried together. Seeing Mrs. Dorsett in the courtroom, Nancy understood why at her own trial the witnesses had erred. She and Mrs. Dorsett could almost have been identical twins.

The jury could reach no verdict with regard to Mrs. Dorsett, and she went free. The jury having found her husband guilty, the judge sentenced him to not less than two and not more than fourteen years.

Nearly two and a half years later, on March 9, 1939, the state legislature awarded Nancy $4000 as compensation for her wrongful imprisonment. But she probably soon spent that money on medical care, for a few months later her doctor discovered that her heart was seriously impaired. Although no one can prove that the prison years directly caused this

ailment, certainly no physician would have recommended the experience for the sake of Nancy's health.

* * * * *

Until April 1935, forty-nine-year-old Clifford Shephard commuted daily from North Plainfield, New Jersey, to Philadelphia, where he was a partner in a prosperous fund-raising organization. A bachelor, he lived alone in a boardinghouse owned by a Mrs. Betty Lester, with whom he was on casual friendly terms. This mode of life abruptly ended for Shephard on April 18.

On that day, about five in the afternoon, Shephard, on his way to the boardinghouse after the day's work, stood on a street corner, waiting for the traffic light to change. A quiet evening loomed attractively ahead. Mrs. Lester, who had been marketing in town that afternoon, chanced to arrive at the same corner while Shephard still waited for the light. Chatting companionably about the evening meal ahead, Shephard and Mrs. Lester crossed the street when the light turned green, and headed for Shephard's car. They did not see the man who had followed them for a block or two until they reached the car. Peering into Shephard's face, the man shouted, "That's him! I'd know him anywhere!"

Before Shephard could reply, the man went on in the same excited voice, "That's the same woman, too. She was with him then."

Shephard decided that this outrageous man did not merit a reply. Taking Mrs. Lester's arm, again he started toward the car. Suddenly two more men appeared. Although dressed in business suits, their police shields introduced them to the startled pair. They offered no explanation of the arrest. Only in the prosecutor's office did Shephard and Mrs. Lester learn the reason.

The man who had followed them to Shephard's car explained. "Three months ago," he told the prosecutor, "they came into my store and cashed a check for thirty-five dollars. It wasn't any good. I'd know them anywhere."

Shephard said that there had been some mistake. He had never been in this man's store, nor had any check he had written ever bounced. The merchant and the prosecutor listened but they did not hear.

"They hooked a lot of us merchants," the man went on. "I can get you plenty of witnesses."

A few days later nine more merchants identified Shephard

and Mrs. Lester as the culprits. The two were soon indicted for forgery. For seven months they remained in jail awaiting trial.

The trial opened in November 1935. The prosecution exhibited the forgeries and called the ten merchants who testified that the accused were the criminals.

Since the defendants had been impoverished by their months in jail, they could not pay a lawyer to defend them. They were represented by a court-appointed counsel, a recent law-school graduate. Despite his inexperience, no doubt this lawyer thought of calling a handwriting expert to testify, but, lacking funds, the defendants could not pay an expert's fee. The defense consisted of the testimony of a series of character witnesses, and of a mechanic who swore that Shephard had been in his garage, waiting for his car to be repaired, while one of the crimes was taking place.

The jury found Shephard and Betty Lester guilty. The judge sentenced them to nine-month prison terms.

The nine months passed and the prisoners were released. Just outside the prison they were rearrested for another series of forgeries.

The second trial was a nightmare repetition of the first. Another group of outraged merchants testified for the state, and the forgeries were put in evidence. The defendants, not able to obtain a handwriting analysis, offered the same pitiful defense. After the guilty verdict, which to the defendants must have seemed inevitable, the judge sentenced Mrs. Lester to a nine-month term, Shephard to one of eighteen months.

The second time Shephard emerged from prison he had aged beyond his years. Nor did the thought of freedom appear golden now, for he had had time in which to reflect on what a prison record meant. His most depressing fantasies were not shaken by reality.

Once a man of standing in the business world, Shephard now counted himself lucky when he found an odd job or two a day. He subsisted on what he earned from mowing lawns and washing dishes. These jobs stopped when, for the third time, he was arrested on a charge of forgery.

Again a group of merchants identified him. But the grand jury did not indict Shephard for these forgeries, since he could prove an alibi, having been in prison when the crimes took place. The case was never brought to trial.

The fourth conflict between Shephard and the state began in 1938. It was then that Shephard, now fully realizing the

consequences of his prison record, determined to prove his innocence.

Borrowing money from a friend, he enlisted the services of the Burns Detective Agency to discover the actual forger. Digging in their files, the investigators found information about a criminal, Edward Sullivan, who resembled Shephard. The agency's handwriting experts, comparing the signatures on the checks allegedly written by Shephard and those actually forged by Sullivan, saw that they were the same in each detail.

With the first feeling of confidence he had known in the long years since his first arrest Shephard applied to the Board of Pardons for a full pardon on the basis of this new evidence. The Board reviewed it, and, without giving any reason, turned Shephard down. Under the state law he could not reapply for a period of two years.

During those two years Shephard supported himself peddling rugs from door to door. In that period, through the Burns Agency, Shephard had an interview with the forger, Sullivan. Seeing Sullivan, then in prison for another crime, Shephard saw how alike he and the forger looked.

Shephard appealed to Sullivan to help clear his name. The forger, more easily touched by Shephard's plight than was the state, signed a full confession admitting his commission of the crimes for which Shephard had served two full prison terms. Mrs. Sullivan signed a written statement that she had passed the checks forged by her husband.

In April 1940, Shephard applied for a pardon a second time, presenting the Sullivans' confessions. This time, he felt sure, he could not lose. However, a few days after he had presented it, his application was returned. Stamped across its face, in large red letters, was the word "rejected."

That afternoon Shephard got a job as a handy man in a bar and grill. There he became friendly with a customer, a newspaper reporter who, outraged by Shephard's treatment at the hands of the Board of Pardons, helped him with his next appeal. It, too, the Board rejected. Every two years after that Shephard and the reporter presented a new appeal. Each time it was turned down.

In the fall of 1950, the newspaperman succeeded in bringing Shephard's case to the attention of Governor Driscoll, who ordered a full-scale investigation. The old Board had been replaced and three new members carefully reviewed the case. In its report to the Governor the Board recom-

mended an unconditional pardon for Shephard, which, on June 14, 1950, Governor Driscoll signed. (A year later, on May 15, 1951, Betty Lester, who had waited until she saw the outcome of Shephard's case, was similarly cleared.)

"I'm grateful that I'm no longer a criminal in the eyes of the law," sixty-four-year-old Shephard said, his fifteen-year ordeal finally at an end. "I know that a guy can get awfully bitter holding a grudge, so I'm not looking back. There are a lot of years left ahead for me. I want them to be good."

* * * * *

Jere Snodgrass, born in Nashville, Tennessee, of a prominent family, was graduated from college as a pharmacist. He married a Toledo girl, and settled in that city with his wife. He served in the Army during World War I. Soon after his discharge he returned to Toledo. There he bought a small chain of drugstores, the source of a comfortable income until the calamitous year of 1929. In that year Snodgrass saw the collapse of his business enterprise. He survived this disaster with a small amount of capital but did not go back into business for himself. Instead he found a job in the sales division of the Toledo Electric Refining Company. For ten years, until, at the age of forty-three, he met a second disaster in 1939, he and his family lived quietly in a modest home in Blissfield, Michigan, within commuting distance of Toledo.

Blissfield was a placid little town whose residents thought of crime as an act committed in some other place. There Scherline Rost and his brother, Lamoyne, owned a drugstore. On the afternoon of January 10, 1939, Scherline completed what, at the time, appeared to be a routine business transaction.

A heavy-set man with glasses, calling himself Joseph Gilbert, bought an electric razor costing fifteen dollars. Gilbert asked if he might pay by check. Rost, deciding that Gilbert had an honest face, was happy to oblige. The check, written for thirty-five dollars, was drawn on the Manufacturers Trust Company of New York and signed by W. C. Reigel, president of the Reigel Hosiery Corporation, where Gilbert said he worked. To identify himself, Gilbert showed Rost an Ohio driver's license and a Social Security card, each bearing his name and signature.

After he had endorsed the check, and while the druggist was making change, Gilbert recalled that he had once been a pharmacist. Rost, to be polite, asked when and in what cir-

cumstances. Gilbert replied that, some years before, he had managed a drugstore on the corner of Monroe and Bancroft streets in Toledo. Then, thanking Rost for his courtesy, Gilbert departed with the electric razor plus twenty dollars in cash.

While this transaction and small talk were taking place, Lamoyne had been within earshot, arranging some new stock in the rear of the store. It was 4 P.M. when Gilbert left the pharmacy.

Ten days later the Manufacturers Trust returned Gilbert's check to the Blissfield bank. The accompanying message read that no Reigel Hosiery Corporation existed. Rost had cashed a worthless check.

Scherline immediately reported the fraud to the police, to discover that Joseph Gilbert's forgeries were well known to them.

Although Scherline Rost had handled the transaction involving the worthless check, his brother, Lamoyne, talked with the Michigan State Police about the forger, Gilbert. Lamoyne, remembering Gilbert's talk of the drugstore at Monroe and Bancroft streets, and, also recalling that a man named Snodgrass had once managed that same store, reported those facts to the police.

On February 2, 1939, Lamoyne, accompanied by two officers from the Michigan State Police and with a warrant for Snodgrass's arrest, identified him as the forger.

Snodgrass, appalled, protested his ignorance of the crime. He said that, on the afternoon of January 10, when Scherline Rost received the worthless check, he had been in Toledo, twenty-five miles away, calling on potential customers. But the jury did not believe him later at his trial, nor did the police believe him now.

The state officers took Snodgrass to the Blissfield County Jail. There he remained for two weeks, when he appeared in court for a preliminary hearing.

The state called two witnesses. Scherline Rost identified Snodgrass as the man who, calling himself Joseph Gilbert, had passed a worthless check. Sergeant Leroy Smith, Michigan State Police handwriting expert, testified that he had examined samples of Snodgrass's handwriting, which were similar, in some details, to the handwriting on the forged check.

On that testimony Snodgrass was held for trial.

The police took Snodgrass to East Lansing, Michigan, for a lie-detector test.

"I believe this man is innocent," the tester said. "He didn't tell me any lies."

A few days later the police received a letter from the Burns Detective Agency, hired by the American Bankers Association to assist the prosecution. The letter advised them that the agency's experts believed the handwriting on the forged documents was not the handwriting of the accused.

Nevertheless, the trial opened on May 16, four months after Snodgrass's arrest. He had spent those months in jail.

The state called Scherline Rost as its first witness. He described the transaction in his pharmacy on January 10, swearing that Snodgrass was the man who gave him the worthless check. Lamoyne, corroborating this testimony, added, "There is not the slightest question or doubt in my mind."

Snodgrass, the first defense witness, testified that he was innocent of the crime, or of any other forgery. On January 10, he said, he had spent a large part of the afternoon at the offices of Toledo Towing Company, where he had gone to collect a bill. He had left there about four, and had then visited the Toledo Auto Dealer's Shop. His business day completed, he had gone home.

The only other defense witness, Mrs. Marcella Timson, credit manager of the Toledo Towing Company, testified that Snodgrass had been in her office on the afternoon of January 10, where he had stayed until sometime after three.

That testimony closed the case for the defense. For some reason (which has not been disclosed) Snodgrass's lawyer did not have a handwriting expert testify.

The state called five witnesses to rebut the defendant's statement that he had never forged a check. A druggist, Frank H. Peet, testified that Snodgrass had given him a worthless check in payment for an electric razor some time in January. The managers of four J. C. Penney stores told of crimes similar to those described by Rost and Peet. Each testified that Snodgrass was the criminal.

On May 20, four days after the trial began, the jury retired to deliberate. It took them fifteen minutes to decide that seven respectable citizens, the state's witnesses, could not have erred. On May 22, Snodgrass heard the judge sentence him to not less than three and not more than fourteen years in the state penitentiary.

"Ever since I was old enough to read," a bewildered Snod-

grass said, "I've believed the American system of justice was infallible. Where is this justice now? If this can happen to me, it can happen to anyone at all."

If justice was not infallible, neither was the forger for whose crimes the judge sentenced Snodgrass. Almost a year after Snodgrass began his prison term Sergeant Smith, handwriting expert of the Michigan State Police, discovered on his desk a forged check with a familiar look. Drawn on the Manufacturers Trust Company of New York by the Reigel Hosiery Corporation, it was made out to Joseph Gilbert. Comparing the check with the state's exhibit at Snodgrass's trial, Smith immediately saw that they were identical.

Smith presented this new evidence to his superiors, who took two actions to remedy the error made by the jury at Snodgrass's trial: They presented the evidence of his innocence to the Board of Pardons and Paroles, and they began a vigorous new search for the actual criminal.

The Board reviewed Snodgrass's case, and, although confronted with the seemingly incontrovertible evidence of his innocence, since he had been in prison when the new forgeries occurred, the members of the Board nevertheless refused him a pardon. Instead they released him and put him on parole. Thus a sort of schizoid justice had been served: Snodgrass regained his liberty, indicating that the Board believed him innocent, but his conviction stayed on the record, implying the Board's belief in his guilt. The record was not disturbed, but Snodgrass did not fare so well.

Some men, thought innocent, find the strength to withstand a prison term. Snodgrass, not such a man, came out of prison with his spirit broken and his health impaired.

In August 1941 the police caught the real criminal, Louis Weinstein, passing a forged check. He confessed to the forgery, was indicted, brought to trial, and convicted. The police knew that Weinstein was also guilty of the forgeries for which Snodgrass went to prison, but at Weinstein's trial those forgeries were not mentioned. However, shortly after his conviction, Weinstein presented evidence to the Board of Pardons that he, not Snodgrass, had committed them. Once more the Board refused to clear Snodgrass by a pardon.

Snodgrass persisted in his desperate efforts to vindicate himself. On November 24, 1942, he called at the offices of the Toledo lawyer who was handling his case before the Board. The lawyer had no news for him. After he left the

lawyer's office, distraught, Snodgrass was dazedly walking the city streets when he suddenly lost consciousness and collapsed. An ambulance, summoned by a bystander, rushed him to the nearest city hospital. There, in the early morning hours of the next day, he died of a cerebral hemorrhage, his third disaster having finally overtaken him. Since pardons are not granted to dead men, on the record Snodgrass remains a criminal. He left his widow penniless; he had exhausted his funds in paying the expenses of his trial and the support of his family while he was in prison. His American Legion post paid for his burial and the headstone on his grave.

2

An accused man has a constitutional right to be represented by a lawyer in any case that may involve a death sentence, and is accorded such a right in virtually every other kind of criminal case in the federal courts and in some state courts. The courts reason that, minus a lawyer, he cannot receive a fair trial. However, if he deliberately chooses to act as his own lawyer, and understands what he is doing, most courts hold that he cannot later complain that he was lacking counsel. If he does not thus surrender his right to counsel but is too poor to pay a legal fee, usually the court will appoint a lawyer for him. In many places today, a lawyer from the Legal Aid Society will appear for him gratis. In some states a public defender, paid by the government, will do so. Let us assume, then, that a poor man accused of crime is always sure to have an able lawyer.

And yet, with the ablest lawyer in the world, an innocent man may be found guilty—solely because of his poverty. For his poverty may mean that his lawyer cannot, by investigation before the trial, obtain evidence that would clearly establish his innocence. For instance, here is Joe Doakes, charged in August 1956 with committing a holdup in Newark, New Jersey, on June 15, 1954. Actually he spent all that day in New York City with his friend, Harry Denny. Denny is an obviously honest man who would impress any jury. If he testifies, Doakes will have a convincing alibi defense. But Denny is missing. No one knows his whereabouts. He may be anywhere—Los Angeles, London, Rome, Delhi. Only a detective can find him. But hiring a detective will cost money—and Doakes has none. So Doakes, unable to prove his innocence, is convicted.

The same is true if there is a missing letter or other docu-

ment that will clinch the defense. Or suppose, to prove his innocence, that an accused man needs the testimony of an expert—a handwriting expert, a ballistics expert, or an expert accountant. To procure the testimony of any such expert witness is expensive—it may cost $1000 or $5000—and the man about to go to trial may not have the wherewithal. Without such testimony his lawyer, no matter how brilliant, cannot prove his innocence. The lawyer resembles a great painter with no canvas, a master surgeon with no surgical instruments.

As we shall later explain, in this country the government, unlike the government in every other civilized country, does not advise the accused before trial of the evidence it intends to use against him. But even if it did, no such pre-trial "discovery" would help to supply the sort of defense evidence we have just described. Seldom does the government have in its possession a missing letter crucial to the defense or know where a missing alibi witness can be found.

The point is that a defendant's right to assistance by counsel is worthless unless it signifies assistance by a lawyer capable of conducting a competent defense. Every experienced trial lawyer knows that careful preparation for a trial is indispensable, and such preparation includes investigation that will equip the lawyer with all reasonably procurable evidence favorable to his client. The right to the assistance of counsel, therefore, becomes an empty right if the defense counsel is unable to investigate in order to obtain evidence indispensable to an effective defense. Which means—what? It means that poverty will often deprive an innocent man of that right. Absent the evidence he cannot pay to get, the accused, in such a case, might as well have no lawyer. He may go to his death in the electric chair, or to twenty years in prison, for mere want of money.

The prosecutor, on the other hand, is usually supplied with ample funds. For him government investigators will scour the world, if necessary, to find a missing witness or document that will aid the prosecution. Usually he can amply afford to hire all the experts he needs. In such circumstances the odds may be all against the poor man, unaided by investigators and experts. How can we say, with a straight face, that such a man has a fair trial? The truth is that, because of poverty, he may receive a shockingly unfair trial.

Edwin Borchard (in his book *Convicting the Innocent*, published in 1932) reports the case of Edward Kimball, tried

in 1926 in Maryland for a swindle that had fleeced a man, Funiceolo, of $15,000. At the trial, not only did Funiceolo positively identify Kimball, but Joseph Elsie, a surprise witness, swore that Kimball had similarly swindled him, the preceding year, in Chicago. The jury found Kimball guilty. But, having considerable means, he hired detectives who soon produced such convincing alibi evidence that, in a very short time, the court granted him a new trial, at which the state's attorney withdrew the charge against him. As Borchard remarks, "Not every victim of the law's mistakes has such funds at his disposal."

All this goes to show that we must face a shocking fact: *A man may be convicted when his only crime is that of being poor* (more or less on the principle, openly avowed in Butler's *Erewhon*, that one who suffers misfortune deserves criminal punishment).

This is not true justice. It makes a sham of the great democratic principle of "equality before the law" when that equality depends on the possession of a well-filled pocketbook. Many of our state constitutions provide that "every person ought to obtain justice freely and without being obliged to purchase it." But an accused has to "purchase" justice, he does not "obtain justice freely," if his adequate defense requires the expenditure of considerable funds. If he does not possess those funds, he may not obtain justice at all. As matters now stand, legal-aid societies do not have money for such purposes. Nor usually, except in trifling amounts, do most public defenders. They supply lawyers, not money.

Judicial injustice remains injustice whatever its cause. When a man, solely because of insufficient funds, goes to the penitentiary, he suffers injustice, although the judge who presided at his trial is impeccably honest, indubitably intelligent and fair, the prosecutor decent and humane, the jury careful and impartial.

This problem is little discussed. Most lawyers shun it. If you mention it, their attitude is that of Andy: "What did you bring that up for?"

The problem must not be shunned. If we believe in the democratic process, we will not long tolerate a situation in which justice in a criminal case is exclusively an upper-bracket privilege. The richest country on the globe should adopt procedures so that a poor man accused of crime will

have available the money essential to prepare for his defense or its equivalent.

The Scandinavian countries do furnish the equivalent: Not only is every accused in a criminal case entitled to counsel of his own choosing at government expense, but counsel for every defendant can call on government officials, at government expense, to make all necessary investigations (including searches for witnesses and documents) and to supply analyses of handwriting as well as expert testimony on behalf of the defendant. In only a very few places in the United States the office of the public defender does much the same.

In a recent Illinois case an indigent defendant, unable to pay for a typewritten transcript of the trial testimony, could not appeal. The Illinois Supreme Court held that this was just too bad. But the United States Supreme Court was not content with this indifference. It said that "a state can no more discriminate on account of poverty than on account of religion, race or color. There is no meaningful distinction between a rule which would deny the poor right to defend themselves and one which effectively denies the poor an adequate appellate review accorded to all who have enough to pay the costs in advance." The Constitution, the court conceded, does not require a state to provide a right of appeal, but if it does provide for appeals, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." The Supreme Court's decision is a splendid one. But the court implied that in this country we now do not "deny the poor the right to defend themselves" in our trial courts. Alas, often we do, except in a few places.

If the accused has ample means, he will usually retain an able lawyer. If he has no money whatever, he has a good chance of obtaining competent counsel, through appointment by the court or the public defender or the Legal Aid Society. But if the accused is a white-collar worker, neither poverty-stricken nor well-to-do, then ordinarily his lawyer will be incompetent. For then neither the court nor anyone else will provide him with a lawyer. He must hire his own, and his inability to pay anything but a small fee means that usually he will be represented by counsel who lacks ability.

There are a few well-equipped lawyers willing to defend the white-collar accused. But in most large cities their number is alarmingly small. There the bulk of the "criminal bar" consists of lawyers with scant legal education. They prey on accused men of modest means. By picking up a few dollars

from each client, each of these lawyers earns a meager living. Feeling little responsibility to do much for a small fee, he conducts the defense in careless, slapdash fashion. He will neglect to call witnesses whose testimony might well prove the defendant's innocence, or to cross-examine prosecution witnesses who, by careful questioning, might be shown up as unreliable.

The innocent white-collar defendant in a large city is thus, ordinarily, more likely to be convicted than if he were wholly destitute. This miserable situation the legal profession should rectify.

CHAPTER FOUR

James W. Preston—Matthew Uchansky—Nathan Kaplan

1

In 1924, Mrs. Dick Parsons, a well-to-do widow of fifty-two, lived alone in the large house once occupied by her husband and herself, in the city of Los Angeles. Often Mrs. Parsons found herself with a lonely evening on her hands. At such times she read herself to sleep or played the piano in her living room until she felt tired enough to go to bed.

On the evening of October 18, Mrs. Parsons sat playing her piano, utterly absorbed. Suddenly, without consciously knowing why, she felt another human presence behind her in the room. Slowly she turned on the piano stool to assure herself that she was wrong. A man wearing a gray felt hat stood facing her, a revolver in his hand. Over his face he wore a handkerchief that left only his eyes visible. Hypnotized, Mrs. Parsons could not take her eyes from his. The eyes, which impressed her even through her anguished haze of fear, were a startling shade of blue.

"Stick 'em up, I want your diamonds," the man said in a harshly nasal voice.

Although Mrs. Parsons thought herself not the screaming kind, she screamed, and raised her arms above her head. The man removed the diamond rings from her upraised hands. He then demanded to know where she kept the rest of her jewelry.

Frightened and confused, Mrs. Parsons, unable to recall where she had last put her jewels, told the burglar so. He commanded her to look around.

With the bandit training his revolver on her Mrs. Parsons searched from room to room. She could not find the jewelry. The burglar, enraged, accused her of stalling for time.

Frantic now with fear, Mrs. Parsons led him into the study, desperately hoping to find the jewels there. On entering the room she saw that one of the window shades was raised. Im-

mediately she realized that, because the light was on, anyone passing on the street could see into the room where the masked man stood conspicuous in the light, which glistened on his gun. The same thought occurred simultaneously to the burglar, making him even angrier. He snarled at Mrs. Parsons, telling her to hurry. Mrs. Parsons' terror overcame her judgment, and, turning, she dashed toward the door and ran outside, onto the porch. The bandit raced after her and fired. Mrs. Parsons fell, a bullet in her back, while the burglar, panicking, fled the house, leaving Mrs. Parsons unconscious on the porch.

Mrs. Parsons' bullet wound was superficial but required treatment in the hospital, where she stayed for several weeks. The police interviewed her there. She described her assailant as about five foot six, weighing around one hundred thirty pounds. He wore, she said, a hat in addition to the mask. She dwelt particularly on the piercing blueness of his eyes, which narrowed to slits when he looked at her.

The police, looking for other clues in Mrs. Parsons' house, learned that the burglar had entered through a first-floor window. On the dust of the window screen they found his fingerprints.

On October 21, three days after the assault on Mrs. Parsons, the Los Angeles police picked up twenty-eight-year-old James Preston for illegally wearing a Navy uniform. A few weeks earlier Preston had received an honorable discharge from the Navy, so he was no longer entitled to wear the uniform.

After graduating from high school ten years before Preston had served continuously in the armed forces, first in the Army and then in the Navy. For Preston these years in the services had been a somewhat troubled time, and twice before he had been in conflict with the law. He had once deserted from the Army, and once had served a term for vagrancy. This record helped convict him of a crime in which he had no part.

As a matter of routine the Los Angeles police compared Preston's fingerprints with those of Mrs. Parsons' assailant. The prints did not match. However, Preston, being short and dark, with blue eyes and a nasal voice, seemed to match Mrs. Parsons' description of the man who had shot her in the back. The police decided to confront him with Mrs. Parsons.

The next morning several Los Angeles papers carried sto-

ries saying that Preston was the Parsons burglar, as his fingerprints matched those of the criminal. Mrs. Parsons, convalescing in the hospital, read these false accounts. The day following the police brought Preston to her hospital room, and asked Mrs. Parsons whether she recognized the prisoner.

No less suggestible than most, Mrs. Parsons identified Preston as the burglar. Never could she forget those eyes, she said, or that nasal voice.

On January 30 the prosecutor filed an information against Preston for burglary, robbery, and assault with intent to murder. On March 11 he went to trial represented by a lawyer from the office of the public defender. He had spent the intervening weeks in jail.

On the first day of trial the prosecutor, clearly not certain of his case, since he had only one witness and no corroborating evidence, suggested to Preston's lawyer, George Benedict, that they reach a compromise: If Preston would plead guilty to one charge in the information, the prosecutor would dismiss the other two. Benedict refused. The next day the prosecutor repeated his offer, but Benedict's answer remained the same. On the following day the prosecutor offered an even better deal: If Preston would plead guilty to simple assault, the prosecutor would dismiss all three counts of the information.

This time Benedict conferred with his client. Telling Preston that the maximum sentence for assault was six months in prison, Benedict also pointed out that if Preston went to trial on the charges as they stood, and the jury found him guilty, he might be sentenced to a life term.

Preston did not consider the matter very long. He refused to change his plea.

The prosecution opened. Mrs. Parsons testified that Preston was the man who assaulted her. She would know him anywhere, she said, by his eyes and voice. On that testimony the prosecution closed.

Preston now found himself faced with the illusion of a choice: He could refuse to take the stand, leading the jury to believe that he could not deny his guilt without committing perjury, or he could testify, laying himself open to cross-examination in which his record would be revealed, thus prejudicing the jury against belief in his innocence of the crime for which he now stood trial. Preston chose to testify.

He swore that he was innocent, saying that, at the time of

the crime, he had been in Long Beach, twenty-two miles from Los Angeles. On cross-examination the prosecutor brought out Preston's record, dwelling on the fact that this time he had been arrested for illegally wearing a Navy uniform. On redirect examination by Benedict, Preston explained that he wore the uniform because, shortly before his discharge from the Navy, his civilian clothes had been stolen by a sailor. He had no other clothing, he said, and until he found a job he would not have any funds with which to buy new clothes.

Next a young woman testified that she had accompanied Preston to Long Beach on the evening of the burglary. She made a poor witness. She spoke in a low, almost inaudible, voice, hesitating before each reply. The fact was that she felt nervous, but the judge obviously doubted her testimony. He questioned her at length in a way that made it clear to the jury that he thought she lied.

Benedict was ignorant of the burglar's fingerprints on the window screen. But some unidentified person told the judge about the fingerprints, saying that they were Preston's. However, in the presence of the jury, the judge did not refer to them.

On March 14 the jury found Preston guilty on the first two charges. On the third they found him guilty, not of assualt with intent to murder, but of assault with a deadly weapon. On March 16, Preston stood before the judge for sentencing.

Before pronouncing sentence the judge subjected Preston to a lengthy interrogation. He dealt severely with many aspects of Preston's personal life, particularly with his past record. His comments showed his attitude toward the prisoner.

"Despite the fact that your fingerprints were there, and despite the fact that fingerprints are the one infallible identification," the judge said, "do you still insist you were not there?"

"Yes, sir," Preston replied.

"Well, the jury did not have that evidence," the judge continued, "which the court had before it at the time. I suppose the jurors will probably be glad to know the court had the evidence that you were identified by the fingerprint system. But I think that the identification of you was ample and complete. There are two elements about you that would make it impossible for any person to be mistaken. One is your eyes, as the witness said, or the victim; the other is your voice. Anyone listening to you testifying on the stand there would

be able to identify you in the middle of Africa or in the darkest night. You have a voice that not one in ten thousand has, possibly, or one in one hundred thousand. You are a young fellow yet. You may be able to train out your voice so you can get rid of certain peculiarities that identify you and always will identify you, in my judgment; but you will never be able to train out your eyes. You committed one of the most serious crimes that can be committed, showing not only an abandoned disposition, to begin with, but a vile and wicked heart, when you shot the poor victim in the back. Well, young fellows like you are doing things of that kind around here, holding people up and shooting them, and expecting to get away. They don't get away. Any legal cause to show why judgment should not be pronounced?"

Preston made no reply.

"You are going now to be sentenced," the judge said. "You better take your medicine and try to learn your lesson. You are young, and despite the fact you are going up there for a long sentence, just the same you need not abandon all hope. You can look forward to regenerate yourself in your mind and your soul, and then try to come out and make restitution to society by right living."

Having delivered himself of this advice, the judge then sent Preston to the state penitentiary for terms of from eleven years to life.

On March 21, Preston arrived at San Quentin to begin his term.

H. L. Barlow, fingerprint expert for the Los Angeles Police Department, knew that Preston was innocent, and kept a constant watch for the fingerprints of the actual criminal. In May 1926, Barlow found what he was looking for, when the police arrested Earl Carroll, charged with a series of burglaries. While Barlow was taking his fingerprints, Carroll said:

"If I told what I knew about fingerprints an innocent man would be released from San Quentin tomorrow."

Barlow, comparing Carroll's prints with those on the Parsons window screen, saw that they were the same. But Carroll, faced with this proof, would not confess that he had shot Mrs. Parsons.

"It's up to you guys to convict me if I'm guilty," he said. "That's what you're paid for."

Carroll, brought to trail for the assault on Mrs. Parsons, was convicted. On September 2, 1926, the governor granted

Preston an unconditional pardon. He had served eighteen months' imprisonment for Carroll's crime.

* * * * *

Shortly after midnight on January 29, 1939, an armed robbery took place in a synagogue at 250 East Fourth Street in New York City, where some fifty members of a fund-raising organization were holding a business meeting. They had almost completed their agenda when four men, armed with revolvers, came in. Compelling their victims to line up against the wall, the gunmen robbed them of $400 worth of jewelry and cash. In order to ensure their getaway the robbers took with them a hostage when they left. They abandoned the hostage on the street and entered an automobile driven by a fifth man, of whom the hostage caught only a glimpse.

Two days later Max Rothman, one of the bandit's victims, saw three men walking on the street. One of them had a familiar face. Rothman recognized him as one of the gunmen. Rothman immediately called a policeman, who arrested all three men.

At police headquarters Rothman identified Bennie Amatsky, the man he had recognized. Rothman could not identify Matthew Uchansky and Fred Metz, Amatsky's two companions. Nevertheless the police held Uchansky and Metz to confront them with the other victims of the crime.

Six other witnesses said that they were certain Amatsky was one of the gunmen. Three identified Uchansky. One witness declared that he recognized Fred Metz.

On arraignment Uchansky and Metz claimed their innocence. Amatsky admitted guilt. He also stated that Uchansky and Metz had not participated in the crime. But, obviously in terror of reprisals, he would not say who his accomplices had been. The grand jury indicted all three suspects for robbery.

At the trial the prosecution called eight witnesses. Two witnesses described the crime. Six witnesses identified Amatsky as a participant. Three witnesses stated that Uchansky had been involved, while only one so testified as to Metz. At the close of the prosecution's case the judge directed a verdict of acquittal for Metz, telling the jury that the evidence against him was insufficient.

The remaining defendants each took the stand. Amatsky testified, as he had at the arraignment, admitting his guilt, and saying that Uchansky was innocent. But, again, he refused to name his accomplices. Uchansky testified that he

was innocent. On cross-examination the prosecutor forced Uchansky to admit that he had a record: The year before, tried with Amatsky on a charge of carrying an armed weapon, he had been convicted. This fact evidently carried more weight with the jury than Amatsky's testimony that Uchansky had not taken part in the robbery. The judge sentenced Uchansky and Amatsky to the penitentiary for not less than ten and not more than thirty years.

For the first four months of his prison term, Bennie Amatsky struggled with himself. Finally the better man won out. Amatsky wrote a letter to the prosecutor, again asserting Uchansky's innocence. This time Amatsky named his accomplices. In doing so, he said, he risked his neck, but he could no longer let an innocent man rot in jail. Men named Gordon and Wisnowski were the second and third gunmen in the synagogue. He did not know the fourth man's name. Someone called Wasserman had been the driver of the automobile.

The prosecutor began an immediate investigation based on this information. The photograph of each man named by Amatsky was in the rogue's gallery, since each had a record. The prosecutor called in all the state's witnesses who had testified at the trial. Showing them pictures of Wasserman, Gordon, and Wisnowski, the prosecutor asked the witnesses whether they could not have mistaken Uchansky for one of these three. Each witness answered in the negative.

Not deterred, the prosecutor continued his investigation, determined to clear Uchansky if he could. The police, after several months of diligent effort, discovered that Gordon had died a gunman's death. They turned up Wisnowski, Wasserman, and Kovarick, the man whose name Amatsky had been unable to recall. Kovarick and Uchansky looked much alike, a fact that had led to the witnesses' mistake. Each of the prisoners except Wasserman confessed to his participation in the robbery.

On June 30, 1940, fifteen months after Uchansky began his prison term, the judge in whose court he had been convicted held a hearing on the new evidence.

Six witnesses testified. Wisnowski, admitting his part in the robbery, swore that Uchansky was innocent. Mrs. Kovarick testified that she had seen the division of the loot. Uchansky had not been present, Mrs. Kovarick said. Mrs. Gordon swore that, before her husband died, he had said that Uchansky was innocent. Three of the state's witnesses at Uchansky's trial testified that they might have been mistaken: Probably

the man they had thought was Uchansky was actually Kovarick.

At the suggestion of the prosecutor Uchansky's lawyer made a motion for a new trial. Instead of granting the motion the judge dismissed the indictment against the prisoner.

Before adjourning court the judge commented that "probably the thing that influenced the jury as much as anything else was . . . the fact that [the defendant] had been convicted . . . before . . ."

* * * * *

In February 1937 agents of the Federal Bureau of Narcotics were in hot pursuit of a man named Max, alias "Kitty," Kaplan, a drug peddler illegally operating in New York City. The agents had received their information about Max from thirty-eight-year-old Laura Miller, a drug-addicted prostitute well known to police, who, in return for her services as a stool pigeon, received small sums of money from the government. The agents also supplied Laura with the narcotics she used, which otherwise she would have had to obtain illegally.

Laura had once bought drugs from Max, six years before, in 1931. Since that time Max had slipped out of sight. But Laura recalled that she used to leave messages for Max in a Brooklyn drugstore owned by his brother. The bureau's agents sent Laura to the drugstore to find out for them where Max could currently be found. At the pharmacy Laura learned that the business had changed hands. The new owner, Leo Hoag, told Laura that he saw Max from time to time. Laura left a message with Hoag, asking Max to get in touch with her by phone.

A few days later Max telephoned. He remembered Laura and wanted to know what was on her mind. Laura replied that she wanted heroin for a boy friend. Max said that he might be able to supply her but preferred not to do business over the phone. He arranged to visit her the next day, February 27.

Laura notified the government agents of the appointment. On February 27 several agents stationed themselves on the sidewalk near Laura's apartment house. When Max arrived, he found Laura with her roommate, Marie Blyer, another stool pigeon working for the government. For a while Marie engaged Max in conversation. Then she left Laura and Max alone to discuss their deal. Before departing Max told Laura

that he would send two henchmen to her apartment to arrange the details of the sale.

Max's men, Hyman and Levine, appeared on March 13. Laura introduced them to her "boy friend," actually a federal agent, who placed an order with Hyman and Levine for two ounces of heroin, which they delivered to him at Laura's apartment later that afternoon. At that time he placed a second order.

On March 23, Max again visited Laura, having notified her in advance. That same day the agents, hoping that Max would deliver the heroin himself, prepared to close in on him. When Max arrived, federal men surrounded the building. Laura's "boy friend" was hiding inside, in a corridor, while Laura and her roommate waited in the apartment. Max's goose seemed clearly cooked. The moment he handed over the narcotics, the agents would move in and arrest him in the very commission of the crime. His conviction would be a certainty.

But Max did not spring the baited trap. He had come, not to bring the heroin, but just to button up the deal. After arranging for its delivery he left without interference. Since he was not carrying narcotics, the agents had no evidence on which to base an arrest.

Three days later, on March 26, Hyman and Levine arrived at Laura's apartment with the agent's heroin. The federal men promptly arrested them.

But when the agents looked for Max, to arrest him on the same charge, he had disappeared. Since Laura could not identify him in the flesh, the agents showed her their rogues' gallery, asking her to pick out Max's photograph. Laura, seeing the picture of a man named Nathan Kaplan there, identified him as the dealer who had visited her and arranged the sales of heroin.

Nathan did, in fact, look amazingly like Max. Added to that extraordinary misfortune, his nickname was "Kitty" too. The bureau's files contained his photograph because, as a young man of twenty-two, in 1925, he had run afoul of the law. Then a small-time drug peddler, he had been arrested, brought to trial, and convicted. The judge sitting on the case, after reviewing Nathan's record—which, except for his one narcotics charge, was clean—had suspended sentence. This humane treatment by the judge had given Nathan the impetus to find a legitimate selling job, at which he earned a comfortable living for his wife and family. For twelve years he

had not been convicted of any crime.

But the penalty for Nathan's early traffic in narcotics had merely been delayed. On Laura Miller's identification the agents of the Bureau of Narcotics arrested Nathan for the sales of heroin to one of their agents. At headquarters that agent identified Nathan as the man who had visited Laura on the afternoons of February 27 and March 23, although (as his later trial testimony proved) he had seen that man only fleetingly.

The grand jury returned three indictments based on the sales of heroin:

Indictment Number One, returned in April 1937, charged Hyman and Levine with the sales. Shortly afterward they were brought to trial, convicted, and sentenced to two and three and a half years respectively.

Indictment Number Two, returned in September 1937, charged Nathan Kaplan, as the sole defendant, with the sales in conspiracy with Hyman and Levine.

Indictment Number Three, returned in January 1938, made room for two Kaplans in the sales: It charged Max and Nathan as having participated in them together. The government's theory now had it that Nathan had made the deal, but that he had obtained the drugs from Max, who manufactured them.

However, Nathan was, inexplicably, tried under Indictment Number Two, which did not name Max and which had been returned before the government had evolved the theory including both Kaplans in the case.

On August 30, 1938, a year after he had been identified, Nathan went to trial. In his opening statement Assistant United States Attorney Martin assured the jury that he would prove that Nathan had dealt with Laura Miller and brought about the unlawful sales. In his opening Nathan's lawyer, James Murray, said he would prove that the government was prosecuting the wrong Kitty Kaplan; that Nathan had no part in the sales of heroin.

Laura testified that in February 1937 she had left a message for Max Kaplan at the drugstore formerly owned by his brother, and that it was Max from whom she had purchased narcotics in 1931. Then she went on to swear that, in answer to her message left for Max, on February 27 Nathan had shown up. On cross-examination she admitted that, before that day, she had never laid eyes on Nathan. Although he

was thus, admittedly, a stranger to her, according to her testimony they had talked just as if they were old friends. She could not explain why, if she told the truth, Nathan appeared in answer to a message sent to Max.

To cast doubt on Laura's credibility, Murray, in further cross-examining her, elicited the following:

Q. How old are you, madam?
A. I am thirty-eight years old.
Q. Have you ever been convicted of any crime?
A. I have.
Q. What crimes?
A. Of narcotics.
Q. How often?
A. Once.
Q. Only once?
A. Once for narcotics in my possession.
Q. And any other time?
A. I was implicated in a conspiracy case.
Q. Were you convicted then?
A. Yes.
Q. Well, now, how often altogether have you been convicted of any offense?
A. I will say three.
Q. And besides the possession of narcotics and the conspiracy, what else were you convicted of?
A. For adultery.
Q. Do you mean prostitution?
A. Yes, if that is what you want to call it.
Q. Well, do you know that prostitution is selling your body for money to men?
A. I guess so.
Q. Do you?
A. I am finding it out right now. I was ignorant of it.

To corroborate Laura Miller, the prosecutor also put Laura's roommate, Marie Blyer, on the stand. She testified that she had seen Nathan at Laura Miller's apartment on February 27, 1937. On cross-examination Murray brought out these facts:

Q. When did you last take a drug before you stepped in the witness stand this afternoon?
A. This morning.

Q. What quantity of heroin?
A. I do not know how much I took.
Q. You have no idea?
A. No.
Q. Where did you get that drug?
A. I purchased it.
Q. Where did you purchase it?
A. I refuse to tell. . . .
Q. How have you made your living in the last two years?
A. By living with Miss Miller and we divide the proceeds.
Q. Of what?
A. Of the checks that she gets from the government.
Q. How many grains of heroin do you take a day?
A. Different amounts.
Q. How many did you take yesterday?
A. I could not tell you that. I have not any way of measuring it. . . .
Q. Now, miss, you have been convicted of what?
A. Of prostitution.
Q. And at that time you were associated with Miss Miller?
A. Yes.
Q. When did you go to jail for prostitution?
A. It was either in 1933 or 1934.
Q. Don't you remember when it was?
A. It was in the summertime.

The agent who had "bought" the drugs testified for the prosecution that, previous to February 27, 1937, he had never seen Nathan Kaplan but that, on that date, he saw him drive up to the apartment house in which Laura Miller lived. On cross-examination, however, he admitted that he was "not positive" that the man who appeared on February 27 was Nathan. However, he confidently identified Nathan as Laura's visitor on March 23. He said that he had then been concealed in her apartment and had seen Nathan leaving it. "I saw a part of his head and his face" but "not his entire body. . . . I saw him leave the apartment. I was within the apartment and looked through a glass door and saw him coming down the hall and past the glass door." His answers on cross-examination went into more detail:

Q. Was there a curtain on the glass door?
A. Yes.
Q. Did the curtain completely cover the glass on the door?

A. It was a lace curtain and completely covered the glass.

Q. So, now, is it true that you made your identification through this door, glass door, covered by a lace curtain?

A. Yes.

On redirect examination by the prosecutor the agent said that the curtain was "some kind of netting. You could see through it. It was transparent." But previously he had said, of the hallway where he had observed the visitor, that it was "quite dark there."

From the moment he opened the defense Murray vigorously tried to prove that it had been Max Kaplan, not Nathan, who had visited Laura Miller to arrange the sales of heroin, and that the prosecution witnesses who had identified Nathan had mistaken him for Max. In this attempt Murray was much hampered by prosecutor Martin, who made an equally vigorous effort to keep Max's name out of the case.

Murray called Hyman and Levine, brought from prison to testify. Each swore that he had delivered heroin to the agent on instructions from the boss. Each said he had never seen Nathan before the trial. When Murray asked them whether Max had directed them to deliver the heroin, each remained silent. Murray showed Levine a photograph of Max, and asked:

Q. Do you know him?

A. No, sir.

Q. Isn't it a fact that you say you don't know him because you don't want to be regarded as a squealer?

A. Yes, sir.

Murray then called Hoag, the proprietor of the drugstore where Laura left the message asking Max to phone her. Hoag testified that this message had been delivered to Max. Hoag also swore that he had never seen Nathan before the trial.

Nathan did not testify, perhaps because Murray advised him not to. For only if Nathan took the stand could the prosecutor bring out the fact of his twelve-year-old conviction, and Murray probably reasoned that, if the jurors learned that Nathan had once peddled drugs, they might the more easily believe that he had engaged in that illegal activity again.

After he had closed his case, Murray asked the judge to direct the jury to acquit, on the ground that the evidence presented by the government had been insufficient to con-

vict. The judge refused this request.

Murray then argued to the jury that, in view of their dubious occupations and the fact that they took drugs, the testimony of Laura and her roommate was hardly to be taken seriously. As to the agent's identification of Nathan, Murray said, "When it is considered that [he] got but a fleeting glimpse of the head and face of the individual as the latter was making his way through a glass door covered by a lace curtain, the conclusion that very little reliance can be placed on [his] identification becomes inescapable."

On September 6, 1938, twelve of Nathan's fellow citizens found him guilty. The judge sentenced him to spend the next twelve years in the penitentiary, and put him on parole for five years after his release. He appealed, but the Court of Appeals, without writing an opinion, affirmed his conviction. In April 1939, Nathan began to serve his term.

Max Kaplan remained a fugitive until October 1939, when he gave himself up and pleaded guilty to the charges in Indictment Number Three. The judge sentenced him to eighteen months in the penitentiary.

Max was sent to the same penitentiary as Nathan, but months passed before Nathan learned that fact. He discovered it only two weeks before Max was scheduled for release. Nathan made a desperate effort to see Max during those two weeks, feeling certain that Max, the only man who could conclusively prove the truth, would not hesitate to help. For Max was now invulnerable. He stood to lose nothing by admitting his sole responsibility for the crime, since he could not again be tried on the same charge.

But Nathan did not succeed in seeing Max, who was released on schedule. Nathan spent the next five years in prison, clinging to the thought that, once his own release enabled him to get to Max, his vindication would be assured.

In the fall of 1946, Nathan's conditional parole began. But Nathan's freedom did not bring him vindication: Max had again gone underground, taking with him Nathan's only chance to clear his name.

Nathan's nightmare quest for Max lasted four futile years. Equally unsuccessful were Nathan's efforts to find economic security. Because of his prison record he could get no steady job. He supported his family as best he could, but that best was none too good. His need to prove his innocence became increasingly acute, not only because he wanted to rid him-

self of the stigma of a record, but because that stigma crippled him in the struggle to survive. Max, however, remained hidden in the labyrinth of New York's underworld.

Nathan did not find him until the fall of 1950, and then by chance. One afternoon, weary and depressed, Nathan walked into a Sixth Avenue cafeteria for a cup of coffee. There, at a table close to his, sat Max.

Max already knew Nathan's story and was inclined to sympathy. But he feared that a confession might again place him in jeopardy and said that he would have to consult his lawyer before deciding what to do. Assured by his lawyer that he was safe, Max signed an affidavit that it was he who had visited Laura to negotiate the sales of narcotics and that he was the only Kaplan in the case.

This priceless piece of paper finally in hand, Nathan felt the weight of thirteen anxious years begin to melt away. Certain of a remedy at last, he filed a motion, in the court where he had been tried, to have his conviction set aside on the ground that, because some of the government's key witnesses had committed perjury, the trial had been so unfair that it lacked due process and therefore his conviction had been obtained by unconstitutional means.

The judge who had presided at his trial was dead. Judge Edward Weinfeld, sitting in the same court, held a hearing on Nathan's motion. Nathan's lawyer put in evidence the record of the 1938 trial. Then he called witnesses to prove Nathan's innocence. Hoag, the drugstore owner with whom Laura had left her message for Max, testified that he knew Max well and had never seen Nathan before his trial. The superintendent of Laura's apartment building, who had seen the man who had visited Laura, said that Nathan was not that man. Max testified about his own participation in the crime, saying that Nathan had no part in it. Hyman and Levine corroborated Max's testimony.

Martin, the Assistant United States Attorney who had prosecuted Nathan in 1938, testified as follows: Only after Nathan's trial had Martin discovered that Laura's note had been delivered, not to Nathan, but to Max. When, in 1939, Max surrendered, Martin had observed the striking resemblance between Max and Nathan and realized how easily the two men could have been confused.

Martin told the judge that if, in 1938, he had known what he now knew, he would not have prosecuted Nathan or would have moved to dismiss the indictment. He now

thought that Nathan had been mistakenly convicted for Max.

After considering the evidence for six months Judge Weinfeld wrote a detailed opinion in which he said, "The court is persuaded . . . that an innocent man has been convicted and that a grave miscarriage of justice has taken place. . . . Upon the evidence, the court, if it had the power, would set aside the conviction, since, as the United States District Attorney now acknowledges, the facts now known nullify the theory on which the defendant was convicted and render that conviction erroneous and unjust. It is with extreme reluctance that the court is forced to the conclusion that it is without power to grant the application. . . ."

For the judge ruled that Nathan had not been deprived of any constitutional right. The sole ground on which want of due process had been asserted was perjury at the trial. But, even assuming that there had been perjury, clearly the prosecution had no knowledge of that fact during the trial. The judge held that, in the absence of such knowledge at that time, the precedents required him to rule that perjury does not amount to lack of due process.

The judge turned to another alternative: He could treat Nathan's motion as one asking a new trial for newly discovered evidence, which Nathan had not been able to obtain before his conviction. A motion of that kind could be granted without a showing of any constitutional violation. The judge said that, if the motion had been made in time, he would unquestionably have granted it. But he held he was powerless to do so, because of a Supreme Court rule that such a motion must be made within two years after conviction: Nathan was ten years too late. "The time limitation . . . works great hardship in this case," the judge continued, "for it is difficult to see how some of the vital evidence now presented could have been available to the defendant during the two year period." But the time limitation was inflexible.

However, Judge Weinfeld went on, in such a case of manifest injustice redress was available through the pardoning power. "The court," the judge concluded, "expresses the hope that prompt consideration will be given to [an application for pardon] so that the interests of justice may be served." He requested that a copy of his opinion be sent to the United States Pardon Attorney.

After Nathan had applied for a pardon, he waited hopefully for well over four years. But, on January 27, 1955, the

pardon attorney denied his application. Since the grant of a pardon is entirely a matter of discretion, not of legal right, despite the fact that Judge Weinfeld declared him innocent on the record Nathan Kaplan stands convicted of Max Kaplan's crime.

2

Under our American federal and state constitutions the prosecutor cannot call the accused as a witness. It is the defendant's constitutional privilege either to remain silent or to testify.

Almost all trial lawyers, however, think that generally this choice is illusory because, if the accused elects not to testify, the jury will usually hold his silence against him. They will usually believe that he is almost surely guilty if he does not avail himself of the opportunity in person to deny the accusation. "The number of defendants who fail to testify and yet are acquitted must be almost negligible," says a competent student of criminal trials.

Perhaps that statement exaggerates. But it is a fact that, in many a case, defense counsel advises the defendant not to take the stand even if innocent. There are several reasons for this advice.

In the first place, an innocent defendant may make a poor witness for himself. While a guilty hardened criminal, to save himself, may lie with aplomb on the witness stand, the innocent man, bewildered by what he knows is a false accusation, may show all the signs ordinarily ascribed to a liar. One court noted that the condition of an innocent man, "testifying as with a halter about his neck," with his liberty at stake, "often creates such apprehensions that he is hesitant and apparently untruthful." "He is examined," said another court, "under the embarrassment incident to his position," which deprives him "of his self-possession and necessarily interferes with his capacity to do himself justice." He "feels the importance of his testimony to such an extent that it unnerves him. The thought of falling into a trap, the anxiety to explain away doubtful points, hamper him." In panic fear he may fidget, turn pale, blush, act sullen, cough nervously, falter, stammer, or speak in a quavering voice. His manner may convince the jury that he lies. So his own testimony may be his undoing.

In the next place, the accused, although guiltless, may be unable plausibly to explain away very suspicious circumstances. Moreover, anything he says will be suspect. For, as

the United States Supreme Court has held, the defendant's interest in the outcome of the trial "creates a motive for false testimony"; indeed, the trial judge will usually so advise the jury. Besides, as almost all accused persons who testify, including the guilty, deny their guilt, the jurors are apt to look askance at every defendant who asserts his innocence.

There is a third reason for counseling many an innocent accused man not to testify: the fact that previously he has been convicted of an important crime. This reason requires a bit of explanation.

When a defendant chooses not to take the witness stand, the prosecutor is not permitted to prove that, in the past, the defendant had been previously convicted (unless the earlier crime is in some way linked up—as part of a plan, for instance—with the crime of which he is now accused). If, however, the defendant does choose to testify, then in most American courts he is treated like any other witness. Because the prosecutor may always reveal that any witness has been previously convicted of a major crime—on the theory that the testimony of an ex-convict is not likely to be trustworthy—most of our courts apply the same theory to the accused if he elects to testify. The judge, to be sure, will admonish the jurors that such evidence bears solely on the truth of the defendant's testimony, and that they must not take it as proof of the defendant's guilt of the crime for which he is now on trial. However, most judges and trial lawyers agree that a jury probably will seldom heed that cautionary admonition. They believe that the jury will usually conclude that, since the defendant was a proved criminal in the past, he is still a bad man, with a criminal propensity, who probably committed the crime with which he is now charged.

Most lawyers and judges think that the accused will be better off if the judge does not give the jury such a warning. For that sort of warning tends to rub in the very fact the jury is cautioned to disregard; it asks the jury, said a great judge, to engage "in a mental gymnastic which is beyond not only their powers but anybody's else." It recalls the classic story of the young boy told to stand in the corner and "not to think of a white elephant."

As a result a defendant, whether guilty or innocent, who was formerly convicted of another major crime is very likely to be again convicted if he testifies. On that account, ordinarily the lawyer for the accused will strongly urge him, even when innocent, not to become a witness if he has a rec-

ord. Such an innocent defendant is, therefore, caught in a vise—probably damned if he does not testify or if he does.

Think, then, how fortuitous a previous conviction may be. "The social stratum of an individual," it has been said, "may determine how much criminality he can get away with." Let us see what that means. Here is Donald Rich, age nineteen, whose father is a reputable, well-to-do citizen. Donald, driving forty miles an hour through a crowded street, is arrested for reckless driving. His father's lawyer talks to the police and the charge against Donald is reduced so that he gets off with a light fine. But here is San Sorrow, also age nineteen, whose father is a bootblack and who lives in a slum. For the same offense, Sam is convicted. Sam now has a record. If years later he is charged with another crime of which he is innocent, that record will be used damningly against him at his trial.

The lawyer for an innocent man who has been convicted unjustly before will, because of such vulnerability, often advise "bargaining" with the prosecutor: Rather than stand trial the defendant agrees to plead guilty to a lesser offense, carrying a shorter prison term than that for which he was indicted. Here again an innocent is punished for a past wrong to him.

The rule is thus cruel and unjust that allows the prosecutor to prove an earlier conviction whenever a defendant testifies. England and a few American states have a much more just rule: The prosecutor may introduce such evidence only if the defendant tries to prove that he has a good reputation or if he attacks the credibility of the government's principal witnesses. Many lawyers today recommend that everywhere in this country this fairer rule should be adopted.

In Kaplan's case the prosecution, as one of its chief witnesses, used a stool pigeon—a prostitute and a drug addict for informing on others. This is not a pretty picture—the government allying itself with shady characters, criminals, members of the underworld.

Yet the courts receive the testimony of such wretches. Why? Because frequently in no other way could crime be discovered and punished.

But the risks to the innocent are impressive. A paid witness of that sort has a strong temptation to lie. One such informer admitted that he had "framed" forty innocent people. The testimony of any such person constitutes a perilous pitfall for the innocent.

Suppose that a convicted man, only after his conviction has been affirmed on appeal, discovers new evidence that satisfies the court that at his trial a major prosecution witness gave important perjured testimony that might explain why the jury found him guilty. Will the convict obtain a new trial by what is called a "post-conviction remedy"?

Almost all our courts say, "Only if the prosecutor knew, during the trial, that the witness lied; if so, the conviction was unconstitutionally obtained. But if, at the time of the trial, the prosecutor was ignorant of the deliberate falsity of the testimony, the conviction must stand."

This distinction derives from the theory (previously noted) that a criminal trial is a sort of prize fight. According to that theory, if the prosecutor knowingly introduced perjured testimony, he dealt the accused a foul blow, and the government must surrender its "victory." But if the prosecutor used that testimony in good faith, then he did not fight unfairly, and the government has a right to retain its "victory" over the accused.

Some lawyers severely criticize this distinction. They say, "If lies sent a man to the penitentiary, the conviction is unjust and outrageous, regardless of whether or not the prosecutor was a party to the lies. In a criminal trial the government, under our constitutions, has the burden of proving, beyond a reasonable doubt, that the accused is guilty; the accused is not obliged to prove his innocence. Consequently, if the prosecutor, as the principal evidence that the defendant committed the crime, knowingly introduces perjured testimony that the jury believes, and the accused is convicted, he has been deprived of a basic constitutional right. Yet, in order to get a new trial (by a 'post-conviction remedy'), he now has the burden of proving the prosecutor's awareness, at the trial, of the perjury, a most difficult undertaking. This means that, in such circumstances, an unfair trial relieves the government of the need to prove guilt. This comes very close to unconstitutionality."

Assuming that all other difficulties are obviated, there is one factor—the time element—that usually renders it impossible for a criminal trial ever to become a thorough search for the actual facts: A trial cannot be delayed for many months or years during which investigators unearth all conceivable enlightening evidence.

This very difficulty, however, since it may yield a mistaken conviction, should make the courts sympathetic to a request to open up a conviction to receive newly discovered evidence that, had it been heard at the trial, might have induced the jury to acquit. Understandably, courts are usually impatient with most such requests because so many of them are ill-founded. Nevertheless this judicial impatience with the many unfounded requests sometimes causes a brushing-off of those few that have substance.

To insulate themselves from frivolous applications to set aside convictions and to grant new trials, the courts have evolved a rule that newly discovered evidence will not suffice if it is "merely cumulative" or would only go to impeach a prosecution witness. At times that rule seems unfair: "Cumulative evidence" means that which covers the same ground as that covered by evidence at the trial; however, the evidence introduced at the trial may have been the testimony of a defense witness the jury did not trust, while the new proposed evidence may be the testimony of another witness, of impeccable character and demeanor, whom the jury might believe. And the proposed new evidence to impeach a key government witness might, at a new trial, persuade the jury that he lied his head off. In one case where the court refused a new trial there was no doubt that the new evidence would have shown that a government officer, whose testimony had been the backbone of the government's case, had subsequently been dismissed from government service for startling misconduct antedating his testimony.

A greater inclination to allow new trials for the introduction of such evidence might mean the release of innocent men from the penitentiary. Recently when, in connection with some such request, a judge asked, "Is this case never to end? When do we stop reconsidering it?" the lawyer for the man in prison replied with emphasis, "When justice is done, Your Honor."

So far as money can recompense him every man proved to have been mistakenly convicted, should of course receive ample monetary compensation from the government responsible for the tragedy. Some of our states and the federal government specifically provide by statute for such compensation, but the maximum amount of those awards is usually far too small. (In the federal government it is only $5000.) Most states make no such financial amends except by a special

statute in each case at the pleasure of the legislature. Here we have a crying need for reform.

The innocent man who is charged with crime and acquitted by the jury has also suffered a grave injustice and may have expended large sums in defending himself. Yet nowhere in this country does such a man receive monetary compensation. Here again reform is surely called for.

CHAPTER FIVE

Gerald Wentzel—Philip Caruso—Bertram Campbell—James Montgomery

1

In 1946, Miriam Green, an attractive young divorcee, was working in a factory in Pottstown, Pennsylvania. She lived alone, near the factory, on the ground floor of a small apartment house in which the tenants were on friendly terms. Since the thermostat that regulated the furnace for the building was located in Miriam's apartment, ordinarily she attended to the heat through the winter months.

The weekend of December 6 had been unseasonably cold, but, although the furnace had gone off, Miriam had not reset the thermostat. Several times during the weekend other tenants had knocked at Miriam's door to inquire about the heat, getting no response from Miriam. Finally, on Monday, December 9, in the early afternoon, two of Miriam's neighbors broke into her apartment to see whether she was ill. They felt sure she was at home, since they had seen her enter the apartment early Friday evening and had not seen her come out again.

They found Miriam in the bedroom, on the bed. The window had been left open, and the bedroom was extremely cold. Miriam lay on her left side, clad only in a short polo coat and bobby socks. At her back, rolled into a ball, was a red kimono. A blue scarf, tied tightly in a sailor's knot around her neck, had been used to strangle her to death. Blood covered Miriam's face, as well as a large area of the bed, in the middle of which lay the imprint of what looked like a bloody hand. Her face and upper body were grotesquely swollen, a condition that indicated advanced decay.

The police, notified immediately, called in Dr. W. L. Franck to examine Miriam. The police later said that they thought she might still be alive, since they saw blood, mucus, and air coming from her right nostril, but Dr. Franck pronounced her dead. He also stated that he believed she had

died not more than twelve hours before the neighbors discovered her, as there was no odor of putrefaction in the room.

By questioning friends and neighbors of the deceased the police learned that, for two years before she met her death, Miriam had been often in the company of a thirty-seven-year old man named Gerald Wentzel, who lived with his wife and child near Pottstown, in the village of Kennilworth. At seven-thirty in the evening of the day on which her neighbors had discovered Miriam's dead body the police took Wentzel into custody for questioning.

Badly frightened, at first Wentzel denied that he had been near Miriam's apartment for four days before his arrest. Later he admitted that, after returning from a four-day hunting expedition two hundred miles from Pottstown, he had visited Miriam's apartment late Sunday evening. Finding her dead, obviously murdered, in panic he had fled.

The police realized that Wentzel was a suspect not to be ignored. In the hope of obtaining a confession they began a prolonged interrogation lasting the better part of two days. The prosecutor, called in by the police, took an active part in the questioning. During this period Wentzel had no lawyer present to advise him about his rights or the wisdom of answering the questions.

Under this ordeal Wentzel admitted to certain facts, some of which had no bearing on the case, but almost all of which the prosecutor later used against him at his trial. Still badly scared by the implications of the situation, in a desperate effort to evade the truth Wentzel made several statements that, immediately, he flatly contradicted. Because he was innocent and unprepared, he acted the stereotype of guilt.

Finally, however, he truthfully admitted that he and Miriam had been living in adultery for two years; that, early in the year, when Miriam became pregnant as a result of their relationship, she induced an abortion by taking drugs; that he had a key to Miriam's apartment but, on returning from his four-day trip to find her dead, he had thrown the key into a nearby river, believing that, with that evidence destroyed, no one would connect him with his murdered mistress. On prodding from the prosecutor he said that, in his shock, he might have placed his hand on the bed in which the dead woman lay. Despite the efforts of his questioners at no time did Wentzel admit that he had murdered her. He persisted in his assertion that she was dead when he arrived; he main-

tained that she must have been murdered while he was away.

On investigation the police apparently learned that Wentzel's weekend alibi could be verified by the members of his club who had accompanied him on the hunting expedition. But the prosecutor, believing that he could prove Wentzel's guilt—despite his alibi and the condition of the body when found—presented the case to the grand jury on the theory that Miriam had been murdered after his return on Sunday night. The grand jury indicted Wentzel.

Early in January 1947, Wentzel went to trial, before a jury on which there were ten women. As his first witness the prosecutor called Dr. Franck. He stated that he had been asked by the police merely to determine whether Miriam was alive. He said that he did not examine the corpse "except to notice she had bobby socks on." When pressed by the prosecutor Dr. Franck said that he did not think she had been dead for more than twelve hours before her neighbors found her—in other words, she had died on Sunday night. The prosecutor asked if the witness noticed whether putrefaction had set in. "I didn't examine the body," the doctor said again. On cross-examination by Wentzel's lawyer Dr. Franck admitted that he had never done pathological work on corpses; thus he had no experience in determining the time of death.

The next state's witness was the coroner's physician, Dr. John Simpson, who had examined the body on the evening of its discovery. Before Simpson testified, the prosecutor introduced some photographs in evidence. These pictures, taken after the body had been removed to the police laboratory, showed the jury Miriam's naked, bloated, bloody corpse. Using the photographs to illustrate this point, Dr. Simpson testified that, in his opinion, because only the upper part of the body showed putrefaction, Miriam had died not earlier than twelve to twenty-four hours before her discovery. In cross-examination Wentzel's lawyer asked, "Is it possible that this body was a corpse for forty-eight hours?" "It is possible," the witness answered. "It could have been a corpse for seventy-two hours?" the lawyer asked. "It could," the witness answered, admitting that Miriam could have died before Sunday night. At the close of that testimony, the judge warned the jury that "However horrible a crime may have taken place, as shown by these pictures, it does not indicate the guilt of this defendant. You will have no prejudice against anyone because of these photographs or anything like that. It may be they are to some extent shocking. They are

only put into evidence for such aid as they may be to you in determining the issue which comes before you for determination." The judge thus unintentionally fixed the horror of the photographs in the jury's mind. The prosecutor then put a police sergeant on the witness stand who testified that, after the defendant had been taken into custody, blood was found under his fingernails. That ended the witness's testimony, for the prosecutor did not attempt to prove that the blood was Miriam's. The prosecutor then introduced Wentzel's contradictory statements during his interrogation at headquarters. Later, in summation, he pointed to Wentzel's first evasions as evidence of a guilty mind, dwelling on the defendant's extramarital relationship with Miriam, and on his flight from the murder scene, as further indications of his guilt. He also made much of Wentzel's admission that the bloody imprints of a hand found on the bed might have been his. He brought sharply to the jury's attention the fact of Miriam's earlier pregnancy. But he made no attempt to prove that Wentzel's hand fit the handprints on the bed, nor did he connect the fact of Miriam's aborted pregnancy with her death. After the presentation of that evidence the prosecutor closed.

Wentzel's defense opened with his alibi witnesses, who testified that, from Thursday evening until Sunday night, he had been with them on a hunting trip two hundred miles distant from the place of the crime. Wentzel's lawyer then called Charles D. Kent, the undertaker who had prepared Miriam's body for burial shortly after the performance of the police autopsy. Having established that Kent had been a licensed undertaker for over twenty-one years, the defendant's attorney questioned him about the condition of Miriam's body when he examined it, not long after Dr. Franck's examination. "The face was almost twice the size," the witness said. "The arms and shoulders were very much enlarged, which of course, was caused by tissue gas, and tissue gases of course caused by putrefaction, which of course would be gas developing between the skin, which would cause the swelling, which is an indication the body had been lifeless for some time. It was swollen to the point it could not be reduced, so that we could make the body visible to show for the family and friends and relatives. Which is very unusual to have something like that occur when bodies are found within a reasonable length of time." He said that, in his opinion, Miriam, when found, had been dead from forty-eight to seventy-two hours. He based this opinion on his "experience and marks of

decay which could not exist in a short time like this." "Is there no history of any case where the body had been dead less than that and the body decayed in a similar manner?" Wentzel's lawyer asked. "Not in my experience," the witness replied. Next Miriam's mother testified that it had been Miriam's habit to spend weekends at her mother's home in a town twenty-five miles distant from Pottstown. On the few occasions when Miriam had other plans she always let her mother know. On the weekend previous to December 6, Miriam's mother continued, Miriam had said that she would return Friday of the weekend following. She did not arrive on that Friday, nor did she phone to say why. Miriam's employer testified that, although she normally worked at the factory on the Saturday-morning shift, on the Saturday of December 7, she did not report for work or phone to say that she was ill.

Several of Miriam's neighbors testified that they had seen her going into her apartment shortly after six on Friday evening and did not see her again. These witnesses also said that, although ordinarily Miriam attended to the thermostat with care, on that weekend she had not turned on the furnace when it went off, even though the building needed heat. When they knocked on her door on Sunday morning to inquire about the furnace, they got no response. All this testimony indicated that she died early in the weekend. Wentzel's physician testified that Wentzel suffered from an inflammation of the skin, causing blood to flow. He said that he had last examined the defendant on December 3, at which time he had several cracked and bleeding lesions on his hands, a condition from which he could not have been free when the police examined him. He said that the blood under Wentzel's fingernails could easily have occurred because he had scratched the injured, itching spots.

Wentzel testified that he had not killed Miriam, and he did not falter when cross-examined by the prosecutor. His testimony closed the case for the defense. In his charge to the jury the judge said, "If you find that Miriam Green did not die on the night of December 8, then Gerald Wentzel did not kill her."

The jury retired to deliberate. In spite of the defendant's evidence, which was strongly pointed to the conclusion that Miriam had met her death while he was out of town, the jurors—perhaps too vividly recalling their graphic view of Miriam's horribly distorted body, and remembering what

had ended the life of Wentzel's unborn, illegitimate child—found they had no reasonable doubt about his guilt. After they had returned their verdict, the judge sentenced the prisoner to not less than ten and not more than twenty years in the penitentiary.

Wentzel's lawyer appealed to the Supreme Court of Pennsylvania. He argued that the state's evidence was wholly circumstantial and insufficient to convict, and therefore the trial judge should have directed a verdict of acquittal. He contended that the introduction of the gruesome photographs of the deceased, and of the defendant's statements to the police, particularly regarding Miriam's pregnancy, should not have been admitted in evidence.

The court rejected all these contentions. As to the sufficiency of the evidence the opinion said, "A careful reading of such evidence reveals that it is more than ample to sustain this conviction of the defendant. While none of the facts presented would be conclusive of his guilt when individually considered, yet there is no doubt in our minds that the evidence presented, when considered collectively, required that the case be submitted to the jury."

Thus the Supreme Court of Pennsylvania affirmed Wentzel's conviction. But, in a vigorous dissent, covering forty printed pages, Chief Judge Maxey (with whom two other of seven judges agreed) took sharp issue with the five judges who voted to affirm the conviction. He said in part, "A careful study of this record convinces me that the Commonwealth produced no evidence which justified a verdict of guilty against this appellant and the trial judge should have given binding instructions for acquittal. He could well have said, as other judges have said under like circumstances, 'No man can be guessed guilty in this court.' If the evidence in this case does not prove the defendant innocent beyond a reasonable doubt, it certainly greatly preponderates in his favor. Wentzel found himself enmeshed in a set of circumstances which raised a suspicion of his guilt, but each of these circumstances is consistent with his innocence. There is no rule at law or at logic that several suspicious circumstances, each one of which is consistent with the innocence of the accused, becomes proof of guilt when considered together. Four or five times nothing is still nothing."

About the state's medical testimony Judge Maxey wrote, "Another fact that tends to prove Wentzel innocent of this crime is the condition of the body when discovered on Mon-

day afternoon. Mrs. Green was discovered at 2 P.M., Monday, December 9. The Commonwealth claims Wentzel killed her . . . the night before, Sunday night. If that was the fact, she would have been dead only fifteen hours when the body was discovered. The testimony which the Commonwealth produced to prove the condition of the body when discovered is most unsatisfactory.

"If later," said the judge, "some prowler should be apprehended and confess that it was he who killed Mrs. Green . . . it would be apparent to all how consistent with Wentzel's innocence of her murder were all the circumstances presented in this case."

Judge Maxey agreed with Wentzel's lawyer that the photographs, the evidence concerning Miriam's pregnancy, and several other facts contained in Wentzel's statements to the police, were inadmissible and extremely prejudicial to the defense.

But since Judge Maxey and his two colleagues were in the minority, Wentzel remained in prison.

Two and a half years later, on September 5, 1950, an American soldier, Clarence Woodley, serving a term for robbery in an Army prison camp in Germany, confessed that he had murdered Miriam Green. As a result the Army transferred Woodley to an American prison camp. The prosecutor handling the resulting investigation interviewed Woodley at length. He also corresponded with the commandant at the German prison camp with regard to the prisoner. The then prosecutor rejected the confession, since he thought it false, and let the matter go at that.

But the publicity stimulated by Woodley's confession aroused the interest of the Court of Last Resort, a private organization dedicated to the freeing of wrongly convicted men. The members of the organization undertook an intensive investigation of Wentzel's case.

They began by checking Wentzel's alibi for the weekend of December 6. In interviewing the members of Wentzel's hunting club, who had testified at his trial, they found his alibi sound. Next the members checked the facts concerning Miriam's weekend activities. After speaking with Miriam's neighbors, fellow workers, and relatives they concluded that Miriam must have met her death before Wentzel's return, just as he had contended at the trial.

The Court of Last Resort then consulted two experts in the

field of legal medicine, Dr. Lemoyne Snyder and Dr. Richard Ford. After these men had jointly examined the medical testimony given at the trial, and the official weather reports covering the weekend on which Miriam died, Dr. Snyder wrote a long report, which said in part, "Considering all of the factors involved, and based on the time when the body was autopsied, it is highly improbable that death occurred less than 48 hours previously, and it is my belief that Mrs. Green expired during a period of from 60 to 80 hours before she was observed by Dr. John Simpson [the coroner's physician]."

Convinced of Wentzel's innocence, the Court of Last Resort presented to the Pennsylvania Board of Pardons Dr. Snyder's three-thousand-word report, together with another long report that contained the statements made by Miriam's sister, neighbors, and co-workers.

On the basis of these documents, the Board of Pardons held a hearing. Shortly afterward the members of the Board unanimously approved the action for which the Court of Last Resort had petitioned on Wentzel's behalf, the commutation of his sentence to the time already served. In 1950, after a three-year-and-one-month imprisonment, Wentzel was released from the penitentiary.

On the day of his release Wentzel made a statement to the press. "I want to get away for a while now," he said, "spend some time with my wife and daughter—get acclimated, I guess. All I want to do is breathe in some fresh air, to see the trees and the flowers," a mild request from a man who doubtless felt that the state had been exceedingly careless of his rights.

* * * * *

In 1938 twenty-four-year-old Philip Caruso lived in one of the poorer residential sections of Brooklyn, New York, with his bootblack father and the other members of his large family. He had clerked in a fruit store for several years but, now unemployed, spent most of his waking hours looking for a job.

Late in November of that year Caruso fell ill with grippe. During his two-week stay in bed he developed a fever blister on his lip. On December 8, still not entirely recovered but bored with staying home, Caruso ventured out. Joining friends in a nearby cafeteria for a cup of coffee, he engaged them in a discussion of the current hockey games.

Shortly after his arrival at the cafeteria two police detectives approached the table where Caruso sat.

"Is your name Phil?" one of them asked.

When Caruso answered yes, they showed him a warrant for his arrest on a charge of armed robbery. Without further explanation they took him to police headquarters, where they placed him in the line-up with four other men. Caruso heard a man's voice say, "That's the boy. He had a gray suit and he wore a gray hat and he had a mole on his lip."

"That's not a mole," Caruso called out. "It's a fever blister. I just got out of bed."

No one paid attention to Caruso's protest. The police held him overnight in jail. The next day, in the office of an assistant district attorney, he learned the facts about the robbery ascribed to him.

On the morning of July 28 a man named Scaramellino, employed by a Jersey City gambling syndicate, had been making the rounds in Brooklyn, collecting money. He parked his car in front of a cigar store in order to collect a debt from Lefty, the manager. Lefty came out to Scaramellino's car and gave him $112 in cash. Scaramellino, consulting his notebook, informed Lefty that he owed a few dollars more. Lefty went back into the store to get the money while Scaramellino waited in the car.

Shortly afterward the car door was again opened, but not by Lefty. Scaramellino saw a stranger holding a gun in his right hand.

"Not a sound or I'll let you have it," the gunman said, getting into the car.

A second man opened the door on the other side. He moved into the driver's place behind the wheel, pushing Scaramellino into the middle of the seat. A third bandit got into the back of the automobile, and the car drove away.

The man on Scaramellino's right, who had a conspicuous mole on his upper lip, swiftly went through Scaramellino's pockets, taking $1400. He instructed Scaramellino not to turn his head, but Scaramellino subsequently claimed that he did not obey instructions and thus could identify the thug.

The man on Scaramellino's right passed the money to the gunman in the back. The driver then stopped the car to let the third man out. A few blocks farther on the driver stopped again, telling Scaramellino to alight, adding that he would find his automobile somewhere in the neighborhood later in the day.

Scaramellino immediately went to police headquarters to report the robbery. He described the gunmen in detail, emphasizing the lip mole of the one who had relieved him of the cash. Because Caruso had a fever blister on his lip, which from a distance might have looked like a mole, Scaramellino identified him in the line-up as one of the participants in the robbery.

The transcript of the line-up proceedings recorded an additional statement made by Scaramellino which Caruso did not hear. "That don't seem to be the right mark I seen on his upper lip," Scaramellino had said after he had identified Caruso. The police ignored that remark. The prosecutor brought Caruso into magistrate's court for a preliminary hearing.

At the hearing Scaramellino testified that he was "pretty positive" Caruso was one of the gunmen in the car. The magistrate, eager to complete the day, interrupted Caruso's lawyer while he was cross-examining Scaramellino in an attempt to establish the witness's obvious uncertainty. The magistrate excused Scaramellino from the stand and ended the hearing with an order that Caruso be held pending a grand-jury inquiry. The grand jury indicted him for armed robbery.

Caruso pleaded "not guilty." His bail was fixed at $10,000. Since his family could not begin to furnish that amount, Caruso spent the next three months in jail awaiting trial, which began on March 8, 1939. By that time, of course, Caruso's fever blister had disappeared. His lawyer was J. Spano, to whom Caruso's father paid a fee of $430. Judge Peter J. Brancato presided at the trial.

The state called two witnesses. A police lieutenant testified that, after he had arrested Caruso, he had seen him identified in the line-up. Scaramellino testified about the details of the robbery, stating that Caruso was one of the men who held him up. This time the witness showed no uncertainty. In cross-examination Spano asked, "Do you remember making this statement to the police officer in the station house: 'I recognize this man because of the mole on his lip'?" Scaramellino answered, "I didn't say that. I said at the time I was stuck up he had a mark on the lip which could have happened by a scratch which dries up or a mole or something of the kind." This interchange marked the only reference by either prosecution or defense to the mole that, according to Scaramellino's original statement to the police, he had seen on the gunman's lip.

With the close of the prosecution's case Judge Brancato ordered a short recess, during which he called Caruso and his lawyer into chambers. The judge suggested that Caruso now plead guilty, in order to save the taxpayers the cost of a continued trial, and to obtain a reduced sentence. Caruso refused to change his plea.

After the recess Spano called three witnesses. Benjamin Cohen, a fruit merchant who had employed Caruso as a clerk for several years, testified that Caruso was left-handed. Since, from Scaramellino's testimony, it had been learned that the bandit had held the gun in his right hand, Cohen's testimony, although not conclusive, was significant. Caruso and his father each testified that Caruso had been ill at home when the crime occurred. That testimony closed the case for the defense.

The jury retired to deliberate, ignorant of two important facts: Scaramellino's very definite initial statement that the gunman had a mole, and that same witness's later doubts that he had been correct when he identified Caruso, because he could not be sure that Caruso had a mole. Since Caruso, when in court, no longer had a facial mark (his fever blister having healed), the jury, sufficiently informed, might well have acquitted him. But they returned a guilty verdict.

Judge Brancato sentenced the prisoner to not less than ten and not more than twenty years in the penitentiary, where Caruso had one insistent problem. "When you're guilty and in prison," he later said, "you're O.K. You can get a good night's sleep. But I was innocent and I kept thinking about that and I didn't sleep so good."

It takes money to appeal a case: There is the lawyer's fee plus the cost of a transcript of the trial testimony. Somehow Caruso's family dug up part of the funds for the lawyer and the transcript. But the appeal became unnecessary.

On July 28, 1939, the police arrested Morris Gottlieb and Jack Jacobson on suspicion of robbery. Realizing that their conviction would be a certainty, Gottlieb and Jacobson, hoping to reduce their sentences, confessed to a number of robberies, including the holdup of Scaramellino. In their confession to that crime they narrated facts that only the holdup men and their victim could have known. According to the confession Gottlieb, who had a mole on his upper lip and looked only slightly like Caruso, had been the gunman who took the money from Scaramellino's pockets.

On August 28, Judge Brancato held a new hearing on Caruso's case. Two witnesses testified. For the first time the facts leading to Caruso's arrest were revealed. The police lieutenant who had arrested Caruso stated that a stool pigeon had informed him that Caruso was "implicated in a holdup of a bookmaker in the Bay Ridge section some time previous." In an attempt to ferret out more details about the crime the lieutenant had gone through the records of the robberies committed in that year. Coming across the Scaramellino case, and with no more to go on than the stool pigeon's vague, unproved statement, he had arrested Caruso. Scaramellino testified that Gottlieb was the criminal he thought he had identified when he picked Caruso out of the line-up.

"I was positive when I seen the right man," Scaramellino said.

"Weren't you positive before?" Judge Brancato asked.

"I was positive until I seen Gottlieb," the witness replied. "Until the last minute I still thought it was Caruso until I seen Gottlieb. Then that made me positive and I said so."

Under the lash of Judge Brancato's bitter denunciation for his careless identification of Caruso, Scaramellino suffered silently. Finally the judge turned to Caruso.

"Well, Caruso, you have been in jail for about five months." (Evidently the judge had forgotten the three months Caruso spent waiting for his trial.) "It is really sad that somebody made a mistake. I am convinced that this was a very sad experience that you had to go through. I am sorry. There is only one thing I want to ask you: Do not feel bitter against the administration of justice. There has been a wrong done to you, but it was an honest mistake. Neither the complaining witness nor the police have any grudge against you. It just happened that way. There was a mistake and there it is."

Shortly after this hearing Judge Brancato handed down a written opinion, ordering that the indictment against Caruso be dismissed and the prisoner discharged, since, from the new facts brought out at the second hearing, Caruso's innocence was clear. In his opinion the judge dealt more gently with Scaramellino: "He [Scaramellino] may have been a little too hasty in his identification of Caruso five months after the robbery and, having once convinced himself, as he thought, that he had the right man, he consistently adhered to his original opinion." The judge considered this "an error of judgment rather than any malicious intent. . . . A no less

regrettable feature of this unfortunate mistake," the opinion also said, "was the failure to advise the Court at the time of trial, of the existence of the two police records . . . wherein the complainant had described one of the robbers as having a birth mark on his upper right lip. These records did not come to light until the Court, on its own motion, after the inception of these [new] proceedings, directed that all records of police activities concerning the arrest of Caruso be submitted to the Court. . . . Had the Court [at the trial] been informed of the contents of those two police reports, I entertain no doubt as to what the result . . . would have been."

In New York State a prisoner, on leaving the penitentiary after serving his sentence, receives twenty dollars from the state. But Caruso did not get this sum on his release because he had not served out his term. Nor did he ever receive any other compensation, and his family could well have used it, for his father had already spent $895 in legal fees alone.

Conceivably Caruso might have sued the police or prosecutor for damages. However, not only did he not have the funds necessary to defray the costs of such an action, but in all likelihood he would have lost the suit, for, to win it, he would have been required to prove malice, a fact at best difficult of proof.

Actually his conviction did not result from malice, but rather from the zeal of the police, so eager to obtain a conviction that they ignored their real responsibility: the protection of society against the actual criminals. Nor are such prosecutory methods peculiar to Caruso's case.

* * * * *

In 1937, distinguished looking, drug-addicted, fifty-eight-year-old Alexander Thiel, first-class betting commissioner, card dealer, and horse player, had reached the height of his long career of forgery without once having been caught by the police. Thiel, otherwise known as "Mr. X," whose methods were well known to the authorities, had cashed forged checks at the banks of almost every important city in the United States. In the fall of 1937 he chose New York City as his next locale, concentrating on the sizable McAlpin estate as his new source of loot.

An office in the Cunard Building, in the financial district of New York, housed the firm of public accountants that

handled this estate. The firm, consisting of three members, Fred Blackstone, Everett Jacobus, and Mrs. Helen Smith, had authority to sign checks on the $15,000 account of the estate at the Central Hanover Bank and Trust Company. Each check had to be signed by two of these three members. Thiel had familiarized himself with the functioning of this office, particularly with regard to the McAlpin bank account.

Late one evening in November, long after the charwomen had left the Cunard Building, and even the late workers in the Wall Street area had gone elsewhere for recreation or for sleep, Thiel, whose business day had just begun, used a dummy key to let himself into the accountants' offices, where he began to lay the groundwork for a new series of forgeries.

He found and took two canceled checks, drawn on the bank account of the McAlpin estate, signed by Jacobus and Mrs. Smith. These he needed for the signatures they bore. He also took five blank checks, numbered 315 to 319, from the checkbook used for that estate. These checks carried the printed names of the Central Hanover Bank and the names of the McAlpin trustees. The checkbook, printed by Vincent O'Toole, a manufacturer of bank stationery, bore his name. To avoid suspicion, Thiel typed a note, which he inserted in the checkbook, purporting to be signed by O'Toole, informing the checkbook holder that O'Toole had omitted blank checks 315 to 319 because they were defective. After looking around to make sure that he had left no traces of his visit Thiel silently departed.

Exercising the caution essential to his long success, Thiel now waited out three days and nights. On the third night he again visited the accountants' offices. He found the checkbook just as he had left it, with the bank balance as it had been. He was now satisfied that no one in the office realized that it had been burglarized.

Thiel knew it was necessary to his plans that he assume an identity other than his own. He had already chosen the man whose part he intended to play, George Workmaster, a securities broker of good standing in the financial world. A few nights after he visited the accountants' firm, Thiel paid a surreptitious call on Workmaster's empty offices, for which he also had a dummy key, in order to obtain additional information necessary to his new role. He discovered that Workmaster lived at 789 Rugby Road in Brooklyn, that his office telephone number was Whitehall 4-2657, and that he

banked at the Commercial National Bank and Trust Company. He also studied Workmaster's signature.

The day following, Thiel chose as his victim bank a branch of the Trust Company of North America. It was located on the ground floor of a building on Broadway, with a subway station directly underneath, thus providing Thiel with a means of a speedy getaway if his plan failed.

On November 19, handsomely attired in an expensive suit and smart accessories, Thiel strolled into this busy bank. He exactly looked the part he played: A tall, heavily built man with graying hair, a long, graying, wax-tipped mustache, and thick eyebrows, Thiel appeared prosperous respectability itself. In his wallet he carried a check, made out to George Workmaster, for $4576, drawn on the account of the McAlpin estate at the Central Hanover Bank. On the check was printed that estate's name, and it bore what looked like the signatures of Jacobus and Mrs. Smith.

Thiel told the bank attendant, who hurried forward to greet him, that he wished to open an account. The attendant ushered him to the desk of Mrs. Mildred Morley, assistant to the president of the bank. Thiel introduced himself to Mrs. Morley as George Workmaster, showing her references he had artfully manufactured. She had him fill in and sign an application as a new depositor. Obviously impressed by his credentials as well as by his other attributes, nevertheless Mrs. Morley asked a cautious question: Why did he wish to open a new account, since he already banked with the Commercial National?

Thiel, never unprepared, answered that, being in difficulties with his wife, he wanted an account about which she did not know. In fact, he added, he hoped that Mrs. Morley would not find it necessary to phone his office in order to check his references, since his wife's sister was his secretary.

Convinced, Mrs. Morley took the check Thiel had given her into the next office where, walled by glass, Rinehart, the bank's president, had his desk. Glancing at the check and then at Thiel where he sat by Mrs. Morley's desk, looking normally impatient but otherwise unconcerned, Rinehart told Mrs. Morley to look into the references and to see whether the check cleared. If these inquiries showed everything in order, Rinehart was prepared to accept the account. Mrs. Morley then had Thiel endorse the check.

Four days later, on November 23, before venturing into the bank to ask about his account, Thiel phoned Mrs. Mor-

ley. He pretended to be a friend of Workmaster with a message for the broker. Mrs. Morley, cordial, assured him the message would be delivered. Now Thiel had reason to believe that he had aroused no suspicion as to his identity. He happened to be right: The bank's credit department had looked into Workmaster's financial status, which was sound, and Thiel's forgery had cleared the Central Hanover Bank.

A few minutes after he had phoned Mrs. Morley, Thiel appeared at the Trust Company of North America. After he had been issued a deposit book and checkbook, he wrote a counter check for $2500, signing it with Workmaster's name, and presented it to the teller, Wesley Irvine. Irvine, having satisfied himself that the signature was correct and the account sufficient, handed Thiel the cash in one-hundred-dollar bills.

Three days later Thiel returned with another forged check, this time for $3000, which he deposited. He then cashed one for $1660. Again Irvine handled the transaction.

Thiel, having relieved the McAlpin estate of $4160, never again showed up at the bank.

On December 1, 1937, the actual George Workmaster received a routine statement from the Trust Company of North America, advising him that his account contained $3000 plus. Enclosed were the two canceled checks Thiel had forged. Since Workmaster did not have an account with that bank, he notified it of the mistake. The bank immediately got in touch with the police, who, assisted by private detectives hired by the banks involved, began a full-scale investigation of the forgeries. The results of this investigation left little doubt that this was one of the notorious Mr. X's crimes.

In his application card opening his account with the Trust Company of North America, Thiel had, by error, written Whitehall 4-2567 as Workmaster's office phone. Actually Workmaster's number was Whitehall 4-2657. Thiel's error provided the investigators with their first lead. The phone number supplied by Thiel belonged to a man named Wesley Mager, a reputable dealer in securities. The investigators considered Mager above suspicion, nor did he resemble the description of the criminal given by his victims. However, following routine methods, the investigators came across the name of Bertram Campbell, a broker who visited Mager's office frequently and who appeared to fit the description of the forger.

Campbell, age fifty-two, stood five foot ten, weighed almost two hundred pounds, and wore a short, graying mustache. Born in England, he had there had two years of college education. At eighteen he had come to America, settling in New York, where he went to night school to learn bookkeeping. His first marriage, which was childless, ended in divorce. He married for the second time in 1929. His wife, Gertrude, bore him three children.

Campbell became a Wall Street securities broker, earning something over two hundred dollars a week. But during the bad depression years he had little money and no job. With the rebirth of prosperity Campbell again returned to Wall Street and soon had an income of ten thousand dollars a year. Then, a few years later, he again ran into bad luck, and once more found himself in financial straits. By 1937, however, he had a reasonably well paying job in the sales department of a Long Island trucking firm. To supplement his income, he became a free-lance dealer in securities.

Campbell and his family now lived in Freeport, Long Island, in an attractive house they rented by the year. Here, in his leisure hours, Campbell enjoyed his gardening and his community activities, which included membership in the Masons and the Elks. His neighbors and associates held him in high regard. Indeed, he probably came close to the American businessman's idealized image of himself. Perhaps the very perfection of the image led the jury, later, to reject it as an artful front behind which lurked an evil character.

The police, having spoken to several Freeport merchants who reported that Campbell had recently paid his debts with one-hundred-dollar bills, thought that he might be their man, for he did look something like Mr. X, and he knew the telephone number written on Mr. X's application to the bank. The police summoned Campbell to the office of the district attorney, saying that the summons had reference to some questionable securities.

Campbell arrived at the prosecutor's office to find three witnesses to Mr. X's crimes waiting to confront him: the teller, Irvine; the bank president, Rinehart; and a teller from a bank in upstate New York that had been victimized by another series of forgeries.

Irvine and Rinehart each identified Campbell as Mr. X. "I wouldn't say that he's the one," said the teller from the other bank.

The police, accompanied by Woods, a detective from the forgery squad, took Campbell to police headquarters. Campbell had meanwhile telephoned his lawyer, who met him there. Woods joined with the officers in interrogating Campbell, who consistently denied any knowledge of the forgeries. After two hours of questioning the police brought Campbell and his lawyer to the office of an assistant district attorney, who interviewed Campbell for a few minutes more, after which he told Campbell that he must hold himself available for further questioning at any time.

A month and a half elapsed. In that interval Campbell did not hear from the prosecutor. He spent many apprehensive days and nights wondering about the prosecutor's plans, in his mind's eye seeing himself the helpless mouse stalked by the hungry, furtive cat.

On February 22, 1938, the assistant district attorney told Campbell to appear at his office the day following. At ten the next morning, when Campbell arrived there, he found Mrs. Morley, with whom Thiel had dealt at the North America bank. As Campbell walked into the room, she pointed to him, saying "Yes, that's the man."

On March 1, 1938, the grand jury indicted Campbell on ten counts of forgery and grand larceny.

After the indictment, before the trial, the assistant district attorney, who was to bring the case to court, had samples of Campbell's handwriting compared with the handwriting on the forged checks. They showed no similarity. The prosecutor now publicly announced an altered theory of Campbell's guilt, saying that it had been revealed that Campbell was the "front man" of a "forgery syndicate." The prosecutor did not disclose what evidence he had to support this revelation.

The police told two tellers from a North Arlington, New Jersey, bank where Mr. X had committed another series of forgeries that Campbell was suspected of being the head of a forgery ring. The tellers, Gugelman and Feldhausen, then shown pictures of Campbell, identified him as the man who, claiming to be one Morton Some, had passed forged checks at their bank.

Before trial the prosecutor had the indictment amended. The ten counts were reduced to four, eliminating the forgery charges, which could not be proved.

On May 10, as the turbulent spring tranquilized itself into

the summer months, and New York's other residents prepared for holidays in distant places or for some degree of comfort in the city heat, Bertram Campbell went to trial for the forgeries of Alexander Thiel. But on May 11 Campbell's lawyer sent a message to the court that he was ill and could not attend. Presiding Judge Nott adjourned the trial to May 12. On that day, since Campbell's counsel still could not appear, Judge Nott granted another adjournment to May 13.

Meanwhile Gertrude Campbell obtained the services of another lawyer, James Wilkinson, a Long Island resident. Wilkinson knew Campbell casually, having occasionally taken the train with him from Long Island to New York. Since Campbell's funds were low, Wilkinson represented him without a fee.

Wilkinson had only a few moments to confer with his client before his trial began.

On May 13 the prosecution put in evidence the forged checks, and then called seven witnesses who testified about the nature of the crimes. Jacobus and Mrs. Smith, members of the accounting firm, testified that the signatures on the exhibit checks were not theirs. Vincent O'Toole, the printer, testified that there had been no defective checks in the book used by the McAlpin estate. William Bayreuther, assistant cashier of the Central Hanover bank where the McAlpin estate had its account, testified that he had cleared the forged checks. George Workmaster swore that he had had nothing to do with those checks. Morton Some, whose identity the criminal had assumed at the New Jersey bank, testified that he had not deposited any checks in that institution.

The prosecutor then called five identification witnesses. Mrs. Mildred Morley identified Campbell as the man who, on November 19, had introduced himself as George Workmaster. George Rinehart, the bank president, testified that he had supervised the opening of Mr. X's bank account, had seen the criminal, and that Campbell was that man. Wesley Irvine, the teller who had cashed the forged checks, identified Campbell as the man who passed them. Feldhausen and Gugelman, the tellers of the New Jersey bank, each testified that he had cashed forged checks for the man on trial. Their testimony closed the prosecution's case.

Campbell's lawyer, Wilkinson, called eight reputation witnesses: Jacob Ecker, a furrier, Wesley Mager, a stock broker, Frederick Brooks, a printing salesman, David Posner, a securities salesman, Joseph Mackey, a stock broker, George

Barrett, an accountant, Homer Ramsdell, accounts clerk for Nassau County, and C. Ludlow Smith, a real estate broker. Each testified, in effect, that Campbell, according to his reputation, was not the sort of man who could have committed the crimes of which he stood accused.

Wilkinson then called August Hartkorn, expert examiner of questioned documents, to testify about his comparison of the handwriting on the forged documents with that of the defendant. But Hartkorn never took the stand, for the prosecutor interrupted to say, in open court, that the state did not contend that Campbell had commited any forgery.

Next Campbell testified. He told the court how he had earned his living through the years, and how much money he had made. He went into the history of the periods during which he had been unemployed. He denied any knowledge of the forgeries. He swore that he had never been inside the branch of the Trust Company of North America where one of the crimes occurred, or in North Arlington, New Jersey, where the other checks had been passed. But on cross-examination he could not produce an alibi for the day on which the New York crime occurred as he was not able to recall where he had been that day.

On summation the prosecutor pointed in detail to what he called the overwhelming evidence against Campbell. When Wilkinson summed up, he asked the jury why Campbell, happy and well-to-do, should turn to crime, and pointed out that Campbell, not a stupid man, were he the criminal, would scarcely have revealed himself by giving the bank a telephone number of an office where he was well known.

The jury found Campbell guilty of Thiel's crimes.

Before sentencing Campbell wrote this note to Judge Nott: "I solemnly swear to you by all that I hold holy, and by the lives of my dear wife and children, that I am absolutely innocent of the crimes for which I was convicted."

Judge Nott, who, in the light of his remarks to the jury after trial, had no doubt that their verdict had been correct, did not reply to Campbell's plea of innocence. On June 3, 1938, he sentenced the prisoner to Sing Sing, the state penitentiary, for not less than five and not more than ten years.

On June 30, Wilkinson filed Campbell's notice of appeal but for lack of funds the appeal was not perfected and was dismissed because Campbell could not pay the stenographer his fee for the transcript of the trial minutes or the printer

the cost of printing the record and the briefs. In July, Campbell's prison term commenced.

During the three years before Campbell became eligible for parole, while he was known as Number 95111, his wife, Gertrude, found the going rough. Destitute as a result of the financial strain attendant on the trial, she and her three children were forced to move to a small flat in Baldwin, Long Island. She somehow managed to subsist on the eighty-six dollars a month provided by the county's welfare agency. Occasionally she even had enough left over to pay the fare to Sing Sing for a visit with her husband.

It is only possible to guess at what is happening in another person's mind, but, whatever the innocent Campbell felt and thought during his prison term, he was a model prisoner. So, on July 6, 1941, age fifty-five, he was released on conditional parole.

It would have been hard to imagine a future for Campbell as grim as his very recent past, so perhaps, by contrast, after his release his difficulties seemed slim. He got a job in Haverstraw, New York, as an inspector for the Long Life Elastic Manufacturing Company. The job paid twenty-five dollars a week. Later in the year he found a position as a bookkeeper, at slightly higher pay, with the Plaza Fuel Company, in Long Island. Meanwhile he continued to report regularly to the Board of Paroles.

Through the years Alexander Thiel's need for drugs had steadily increased, as had his difficulties in obtaining them. Finally, in 1944, Thiel found a setup in Chicago that he thought had solved his problem permanently.

He gained access to the office of a doctor who had recently joined the Army. By studying the doctor's signature, which he found in the office files, he was soon able to write his own prescriptions. Pretending to be a Major Maclay suffering from gastric ulcers, Thiel had the prescriptions filled.

Thiel found this an effective scheme for only a while. One day, on arrival at the pharmacy where he called for his prescriptions, he found two federal agents waiting to arrest him.

The federal grand jury in Chicago indicted Thiel for violation of the Narcotics Act. While free on bail, awaiting trial, Thiel committed another series of forgeries. Using the same technique he invariably employed, he opened a fraudulent account in a Chicago bank. On this occasion he profited by $10,700.

On April 10, 1944, Thiel, having pleaded guilty to the narcotics charge, was sentenced to a year and one day. Since he was a drug addict, the judge, instead of sending him to jail, committed him to the United States Public Health Hospital at Lexington, Kentucky. Should the doctors there judge him to be cured in less time than that of his sentence, he would then go free.

As a matter of routine the police placed Thiel's picture in their rogues' gallery, where it had not previously appeared, since, until now, he had escaped arrest.

The Federal Bureau of Investigation (which has jurisdiction in forgery cases in which a bank is involved) had never been satisfied with the jury's verdict with regard to Campbell and had continued to keep an eye out for Mr. X. Investigating the recent fraud on the Chicago bank, the F.B.I. agents suspected that it was one of Mr. X's crimes. The Chicago bank teller who had cashed Thiel's forged check, when shown the police rogues' gallery, picked out Thiel's picture instantly.

On March 21, 1945, the authorities at Lexington released Thiel as cured. F.B.I. agents immediately arrested him, and he was soon indicted for forgery by a federal grand jury in Chicago. An assistant United States attorney, in charge of the Chicago case, invited representatives of the New York police to help prepare for trial, for he believed that Thiel had also committed forgeries in the New York area.

Thiel's identification and arrest gave rise to a considerable amount of publicity. The New York *Times*, for instance, called him "the master forger who looks like Lionel Barrymore." The newspaper accounts described the technique of his alleged forgeries in great detail.

Campbell, reading these accounts, immediately saw that Thiel's distinctive style of operation closely resembled that of the criminal for whose forgeries he himself had gone to prison. Convinced that Thiel had committed those crimes, Campbell knew he needed help to prove that he was right. He consulted with James C. Webster, a lawyer friend. Webster discussed the situation with agents of the F.B.I., and with the assistant United States attorney handling Thiel's case. They agreed to investigate the matter of Campbell's innocence.

Under questioning by the police and prosecutor Thiel confessed to a number of forgeries, including the crimes for

which Campbell had been convicted. At the request of the prosecutor, Rinehart, the New York bank president, and Gugelman and Feldhausen, the tellers from the New Jersey bank, came to his office to confront Thiel. Campbell and Webster, also summoned, waited in another office.

After Thiel had refreshed their recollection with information about the crime that only the criminal could have known, Feldhausen and Gugelman agreed that Thiel, not Campbell, had passed the forged checks. Each signed an affidavit to that effect. Rinehart, on the other hand, said that he could not be sure that he had testified incorrectly at Campbell's trial.

Webster now brought Campbell into the room, placing him next to Thiel so that the witness could compare them. The two men, the guilty and the innocent, side by side did not look very much alike. Both wore mustaches, although in different styles, were middle-aged and graying, heavily built and fairly tall. The similarity between them ended there.

Still Rinehart said that he could not be sure. A few days later Wesley Irvine, the teller from the New York bank, asked to compare Thiel with Campbell, said that Thiel was the man whose forged check he had cashed. Just before he went to trial for the Chicago forgery, of which he was convicted, Thiel signed a written confession to the forgeries for which Campbell went to prison. But at that time no further action was taken to clear Campbell's name.

A few months later a New York lawyer, Robert Daru, began an investigation of the Campbell case under the auspices of the New York County Criminal Courts Bar Association. Daru held public hearings at which several witnesses testified. The tellers, Irvine and Feldhausen, for the first time publicly described the methods employed by the police and the banks' private detectives, techniques designed to persuade the witnesses that Campbell was the criminal.

"He was represented to me as a front man of a forgery ring," Feldhausen said, "and I was told that his conviction might lead to the clearing up of the rest of them."

Both witnesses stated that they had been influenced by the volunteered information that Campbell had been using one-hundred-dollar bills in payment of his debts. Irvine said that the forger's most striking physical characteristic had been his wax-tipped mustache, a fact of which the witnesses had informed the investigators. Before Irvine had confronted

Campbell, a private detective had shown Irvine Campbell's photograph. But Campbell's short mustache had been eliminated from the picture, and a long wax-tipped mustache, such as the criminal wore, had been inked in. Had the judge and jury known of this method of identification at Campbell's trial, no betting man would hesitate to lay odds that the prosecution would have lost its case.

"I and the other witnesses," Irvine said, "were given lots of time and opportunity to get the picture of Campbell with the painted-in mustache confused in our recollections with whatever image we retained of the actual criminal. As weeks went by, the more my mind pictured Campbell standing at the cashier's cage, the less I remembered the fleeting glimpses of the forger."

Daru's investigation stimulated the Governor of New York to order a full report on the Campbell case from the state Board of Paroles. The Board responded with a forty-thousand-word report fully vindicating Campbell.

On August 28, 1945, Campbell and Webster arrived in Albany at the Governor's request. The Governor presented them with a full pardon for Campbell and announced to the members of the press gathered in his office that he would recommend to the legislature that Campbell be liberally compensated for his wrongful imprisonment.

On January 30, 1946, the Governor signed a bill that allowed Campbell to sue for damages. "It is fitting that this bill should become the first law of this year," read the Governor's statement to the press. "It symbolizes the importance of justice to one man and our respect for the dignity of the individual."

A few weeks later Webster filed Campbell's claim for $151,000 in the New York Court of Claims. On June 17, 1946, Presiding Judge James J. Barrett awarded Campbell $75,000 for his "humiliation," and $40,000 for "lost wages," a total of $115,000. In August of that year Nassau County billed Campbell for $4,000, the amount the welfare agency had given Gertrude Campbell while her husband served his prison term.

Campbell remained alive eighty-two days after New York State had compensated him for his ordeal. On September 7, 1946, he died of a cerebral hemorrhage, believing to the last that the state's respect for the dignity of the individual, of which the Governor had spoken, had been extraordinarily

inconspicuous with regard to him during the investigation and prosecution of his case.

* * * * *

By 1923 it had become possible, at least in some areas of the United States, for a Negro like James Montgomery to live as a respected member of his community. Paradoxically the Ku Klux Klan could still flourish in that same area. Montgomery, age twenty-six, a veteran of World War I, had his home in Waukegan, Illinois. Although not, by any standards, a man of means, most people would have thought him in comfortable circumstances. He held a well-paying factory job that provided him with sufficient funds to lay aside some money every year for an emergency or a luxury. He owned two houses in the town. One he rented out; the other he and his wife occupied. Appearances indicated that his marriage was more than usually happy and that he found his life a fully satisfying one. But his world's end, swift and terrible, rested on but a word or two.

The words were spoken by a sixty-two-year-old spinster, Mamie Snow. Mamie sold notions, door-to-door, to keep herself alive. To fill the fearful void she must have known, she lived largely in her fantasy. Sometimes Mamie's images became so vivid she confused them with reality. One of Mamie's fantasies sent Montgomery to the penitentiary.

Mamie knew Montgomery by sight, having often sold her wares in his neighborhood. In the grip of a nightmare fancy about him, in December 1923, Mamie went to the police with a story she doubtless thought was true: She told the officers that Montgomery had attacked and raped her.

The police chief immediately arrested Montgomery. The prosecutor, a member of the Ku Klux Klan, had had past dealings with Montgomery. A year before, Montgomery won a civil suit against the prosecutor. Outraged by this rejection of his creed of white supremacy, the prosecutor welcomed the opportunity for revenge that Mamie's story afforded him.

As a matter of routine he had Mamie examined by a physician, Dr. John Walter. Dr. Walter found no evidence of rape, thus destroying the case against Montgomery, since his findings proved that there had been no crime. But the prosecutor, determined to bring Montgomery to trial, suppressed the doctor's evidence when he presented his case to the grand jury, which, on the basis of the demented Mamie's testimony,

indicted Montgomery for rape.

On the eve of trial Montgomery and his lawyer were threatened with the violent wrath of the Klan if Montgomery set up a serious defense. The threat had its intended effect.

In the first week of January, Montgomery went to trial. His terrified lawyer did not examine the prospective talesmen; he accepted a jury hand-picked by the prosecutor. After Mamie had told her story, the prosecution rested. Montgomery's lawyer, who had not cross-examined, offered no evidence. The case went to the jury, who, on January 9, 1924, found Montgomery guilty. The judge sentenced him to a life term in the penitentiary.

Montgomery spent twenty-four prison years in utter hopelessness. To add to his bottomless despair, he lived with the knowledge that his wife, barely able to subsist after the funds from the sale of his property and life savings had been exhausted, had fallen ill.

But the facts behind Montgomery's conviction finally emerged. In 1947 a Chicago lawyer, Luis Kutner, visited a client in the penitentiary. Kutner's client told Kutner that Montgomery needed help, and suggested that the lawyer talk to him, since a belief prevailed among the prisoners that he was innocent.

Kutner spoke with Montgomery in his cell. No one else knows what they said that day, but Kutner left convinced that Montgomery did not belong in prison.

Kutner began a thorough investigation into Montgomery's case since, although he felt sure that he knew the facts, he needed proof. It took him two years to collect that proof. He learned that Mamie, who died later in a mental hospital, did not recognize Montgomery on the day after she identified him at police headquarters. He obtained evidence of the Klan-inspired threats to Montgomery and his lawyer. He spoke to Dr. Walter, who told him of the evidence the prosecutor had suppressed.

His investigation complete, early in the summer of 1949 Kutner, on Montgomery's behalf, filed a petition for a writ of habeas corpus before Judge Michael Igoe in the United States District Court of Chicago. On June 27, Judge Igoe held a hearing at which Dr. Walter testified that there had been no crime. The judge then made an intensive study of the evidence. On August 10, 1949, he handed down his opinion in which he said that Montgomery's innocence was clear,

as was also the prosecutor's guilt.

" . . . society cannot suppress lawlessness by means of lawlessness," the judge's opinion read. " . . . society cannot inspire respect for the law by withholding the protection of the law from those accused of crime. It was and is the prosecuting attorney's duty to assist in giving a fair trial to a defendant . . .

"There is one way to stop a practice that has become altogether too common, and that is to bring it to a conscious level where the public can scrutinize it and take such steps as are necessary to ensure a true rendition of justice to all. . . ."

The judge ordered Montgomery's release, on the ground that, because of the gross unfairness of his trial, he had been denied his constitutional rights. The state did not seek to try him again.

Through Kutner he brought suit against the state for $250,000, in the Illinois Court of Claims. But that court turned Montgomery down on the ground that, since the prosecutor was an employee of the county, the state had no responsibility for the methods he pursued.

Until 1956 bills were introduced in the Illinois legislature to provide compensation for the wrongly convicted man. In December of that year the most recent bill died in committee. Apparently the ten dollars he received from the prison warden, the sum given to each convict on his release, is the only compensation the state feels is due Montgomery.

2

Suppose that the prosecutor knows of a witness, unknown to the defense, whose testimony, if believed by the jury, would substantially aid the accused. Does the prosecutor owe a duty to tell defense counsel about that witness? If the prosecutor conceals this information, and, after the accused has gone to prison, the accused learns of that witness, will the court set aside the conviction and give the accused a new trial?

At one time almost all courts refused such relief. Now there is an increasing tendency to grant it, although some lawyers, imbued with the idea of a criminal trial as a fight, resist this tendency. However, the Canon of Legal Ethics of the American Bar Association proclaims: "The primary duty of a lawyer engaged in a public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secretion of witnesses capable of establishing the innocence of the accused in highly reprehensible." Some prosecutors,

like J. Edward Lumbard, now a federal-circuit judge, have scrupulously followed this precept. But many others have not, as appears from the reported cases. In the very nature of the situation, however, such suppressions are secret and therefore usually not subsequently revealed.

The Canon of Legal Ethics will not enforce itself, and the courts, absent a disclosure of the suppression, can do nothing to enforce it. The sole remedy is the selection of prosecutors trained to regard their moral obligation conscientiously. At present it would seem almost surely true that there are many unknown cases where innocent men are behind prison bars because the prosecutors disregarded that obligation.

Even if a prosecutor is highly conscientious, he may mistakenly bring about the conviction of some innocent man. The menace to the guiltless becomes singularly great when a politically ambitious prosecutor seeks to advance himself through newspaper renown for the large number of convictions he obtains. Such a prosecutor, eager to prove a suspect guilty, will carelessly, or even sometimes deliberately, neglect painstaking investigation, before indictment or trial, of leads that might well show the suspect's innocence. Such a prosecutor will all too easily develop what Sam Hobbs (a lawyer with much experience in prosecutions) calls an "occupational disease," a "habit of drifting into a chronic spirit of hostility toward each new suspect." Judge Bernard Botein writes of the ruthless, unscrupulous, but successful prosecutor who "rides roughshod over the rights of an accused," lashing the helpless suspect resoundingly, and so "with little risk wins headlines or fame." Prosecutors of that sort, says Judge Botein, are "dangerous out of all proportion to their number."

To help prove a defendant's guilt, frequently the prosecution introduces evidence that he acted guilty. Showing that he fled soon after the commission of the crime, the government argues that "the wicked flee when no man pursueth, but the righteous are bold as a lion." Or the prosecution may prove that the accused concealed or destroyed a weapon like that used to commit the crime, or invented a fake alibi or false clues, or that, when arrested, he stammered or was confused or told lies. The courts say that such conduct tends to show "consciousness of guilt." Without doubt such proof, which seems damning, often induces juries to convict.

Yet not only the guilty show signs of apparent guilt. Judge

Lemuel Shaw, a great Massachusetts judge, remarked that "an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding arrest and conviction"; he may be "stunned under the mere imputation of guilt." Shaw went on to tell of the famous old English case of Graham, tried for murder of his young niece. Graham, at his trial, attempted to deceive the jury by presenting another girl as his niece. The prosecutor's exposure of this deception led to Graham's conviction. He was hanged. Some seven years later his niece turned up, alive.

The innocent man's fears, causing him to act guilty, may be caused by apprehension of undeserved disgrace. Those fears may stem from want of courage; the idea of being tried for a crime would dismay anyone, especially if innocent. As Daniel Webster once said: "If the defendants were innocent, would they not feel indignation at an unjust accusation? If they saw an attempt to produce false evidence against them, would they not be angry? And, seeing the production of such evidence, might they not feel fear and alarm? And have indignation, and anger, and terror, no power to affect the human countenance?" If there are suspicious circumstances that seemingly implicate a guiltless person, but that he cannot satisfactorily explain, he may be so confused as to display what seems signs of guilt. Perhaps to explain why he was present near the scene of a murder, a respectable married man with children would have to make known that he was having an illicit love affair. If his wife was murdered, he may know that it will be easy to show that he had a strong motive for killing her and that he had recently quarreled with her violently; he may even have secretly thought of killing her, and thus feel a sense of guilt. Arrested, he may tremble or faint, or blush, or grow pale, or bite his nails, or stammer, or sweat profusely, or tell falsehoods. So it is that, for a variety of reasons, innocence may look like guilt and bring about a mistaken conviction. The unscrupulous prosecutor ruthlessly exploits such manifestations of guilt.

As we briefly noted in Chapter Two, danger of mistaken identification often results from the use by the police of suggestion—silent coaching—of a prospective witness, which leads him from uncertainty to positiveness of belief that a man the police suspect was the man who committed the crime and of whom the witness caught but a "fleeting

glimpse." Such silent coaching often takes the form of showing the witness, before he confronts the suspect, a photograph of the latter. The witness is likely to superimpose on his memory of how the criminal looked the features in the photo. Having, as a consequence of such suggestion, said, "Yes, that's the man," the witness's self-esteem will usually induce him to stick to this response, without hesitation, when later he testifies at a trial. This technique is properly labeled "suggestion," which has been defined as "communication of an idea from one person to another so as to secure its acceptance with conviction in the absence of adequate logical grounds for its acceptance." The Campbell case is illustrative, although there the suggestion method was augmented by adding a mustache to Campbell's photo so that it would more closely resemble the actual culprit, whom the prospective witnesses had seen.

Even without the use of a photograph suggestion frequently operates when (as in Edward Larkman's case, described in Chapter Seven) the police show the witness a single suspect. The witness is likely to ask himself, "Why is that man here if there is no evidence of his guilt?"

The so-called "police line-up" or "identification parade," properly conducted, diminishes the danger of tragic mistakes in identification: A number of persons, including the suspect, who resemble one another in height, weight, and dress are "lined up" before the witness, who has not previously been shown a photograph. Unfortunately the police sometimes use this technique so unfairly that it promotes, rather than lessens, suggestion. For instance, they arrange that their suspect is the one person in the group who wears an overcoat.

There should always be a stenographic report of the proceedings at the line-up. If subsequently the suspect is charged with the crime, a copy of this transcript should be furnished to his lawyer before the trial. For the transcript may disclose that a witness who identifies the accused at the trial failed to do so at the line-up. Denial by the police of the existence of a transcript, which contained just such a disclosure, brought about the conviction of an innocent man in a famous New York case.

A New York judge has said, "Perjury is committed in 90 per cent of all the criminal cases tried in this city." Those figures cannot be verified. But most trial lawyers and trial judges agree that the amount of deliberately false testimony

in civil and criminal cases is very substantial. A lawyer has quipped that most civil cases are won by a "preponderance of the perjury."

The lying witness, if well trained, may tell a plausible story that is difficult to expose and that the jury may believe. Surprisingly, many men, scrupulously honest in their daily affairs, have no hesitation in lying on the witness stand. "It is," said an experienced trial lawyer, "one of the perplexing realities of our human nature that men who are entirely honest in every other activity, who . . . would scorn to cheat at cards, whose word is good in any financial transaction, who would shrink from a lie in everyday life, are—possibly unconsciously—void of scruples when they take the witness stand, and completely change their personalities. They make the facts confirm their own ideas as to doubtful circumstances. They state as definite actualities matters that are mere impressions or conjectures, and . . . so interlace fiction with reality that their testimony constitutes just as big a falsehood as if it were told deliberately and maliciously."

Fear of prosecution for the crime of perjury does not seem usually to serve as a deterrent. "A Lord Chief Justice of England," according to Philip Guedalla, "said that the greater part of his judicial time was spent in investigation of collisions between propelled vehicles, each on its own side of the road, each sounding its horn, and each stationary." A well-known Chicago lawyer wrote recently, "In the forty-two years I have been around the courts, I have yet to see a witness I knew was an out-and-out liar." Successful prosecution for perjury is not easy, because in most courts conviction for that crime requires the testimony of at least two witnesses to the act of false swearing. A lawyer writes that "for every perjurer, convicted, nine escape for want of definite proof. To the unscrupulous this ration is encouraging enough to chance perjury whenever in his eyes it is salutary."

Suppose that a witness at a criminal trial testifies dishonestly for the accused, who is then acquitted. The prosecutor, angered by this defeat (especially as the prosecution, in the federal courts and in most states, cannot appeal from an acquittal), may then prosecute the witness for his perjury. Although success in prosecuting for perjury is difficult, in a considerable number of such cases the dishonest witness has been convicted.

But what of a prosecution witness who lied and whose testimony caused a conviction? The records show very, very

few instances in which such a lying witness has been indicted, much less convicted, for his perjury, since it does not usually arouse the prosecutor's indignation. And if the prosecutor does not prosecute such a liar, the defendant, who was convicted by the false testimony, can usually do nothing; and a suit for damages will seldom succeed. In other words, it is far safer for a witness to lie for the prosecution than for the accused.

And yet the false testimony of a single witness, believed by the jury, may be for an innocent defendant his ticket to prison, with no return trip for twenty or more years.

There has been much touting of "lie detectors" (including "truth serums") as a method of uncovering perjury and thus of eliminating its harmful effects in trials. However, almost all courts have refused to accept tests by means of such "detectors" as evidence of either lying or truthtelling, and probably the majority of psychologists and psychiatrists agree with the courts. Why? Because, for a variety of reasons, those tests have proved far from trustworthy. (For instance, a trained liar may have not only a "poker face" but a "poker pulse"; and a truthful man may be so apprehensive that the "detector" will mark him as a falsifier.) On account of his unhappy experiences in which "lie detectors" made innocent men appear guilty, and guilty men innocent, J. Edgar Hoover will not allow the F.B.I. to employ such devices.

Perhaps someday someone will invent a reliable device to detect perjury so that almost every lying witness will be exposed. But perjury by no means comprises the principal source of error in testimony. No lie detector, no matter how perfect, will expose an honest witness's honest mistakes—his mistakes in observation or in memory or those errors that stem from his unconscious prejudices.

Many first offenders (so most students of penology believe) could be rehabilitated. The crime for which such a man has been convicted may not be a symptom of deep-seated criminality. He may have been guilty of drunken driving that killed a child, or of stealing a few dollars to feed his starving family. Understandingly treated in prison, he might at the end of his prison term lead a decent life.

However, as our more humane prison authorities admit, prison all too often turns such a man into a lifelong criminal. He becomes a mere number, deprived of all privacy, sub-

jected to constant surveillance. "Stripped of his own clothes, possessions, name, family, and friends," says Nathaniel Cantor, "he is thrown into a system which robs him of self-direction." He lives with professional criminals who look upon the prison guards—some of whom are brutal—as representatives of a hostile society. The prison atmosphere, even in the best penitentiaries, is saturated with anti-social attitudes. The more case-hardened prisoners conduct a crime school: They give the newcomer to prison a daily training in deception; they teach him that an ex-con has no chance of earning an honest living; they instruct him in crime techniques. A reformed convict recently wrote regretfully that ordinarily "a convict retains his reason and maintains his initiative to the extent that he learns furtiveness, deceit, suspicion and predatory alertness. His survival depends on the speed with which he can learn to be a professional criminal." The more robust newcomer may withstand these influences. But when he leaves prison, he emerges into an unfriendly world; he often finds true the cynical reports he heard, inside, about the impossibility of going straight on the outside. For few honest employers will long employ a man if they know he has a prison record, and such a man wears invisible prison stripes, which employers soon see.

Now think of the effect of imprisonment on an innocent man. Unless he has an unusually strong character, he may be dominated by bitter resentment. It may add to his bitterness that ironically, if he protests his innocence, the prison psychiatrist—naturally enough assuming the guilt of all prisoners—may interpret his protestations as symptoms of seriously disturbed criminal personality. And the parole board, when considering whether he is to be paroled, may hold his protestations against him, regarding them as evidence of an unreformed and unrepentant attitude. Pondering on the injustice done him, the innocent convict may succumb to the teachings of the prison crime school. When his term expires and honest jobs prove unavailable, he may join real criminals and engage in a criminal career.

This is not invariably the case. Clifford Shephard did not react in this manner. But we should not be surprised if many another innocent convict, made of weaker stuff, repays society for the ills it inflicted on him by becoming one of its enemies.

When Campbell was finally vindicated, Judge Barrett said of him, "He suffered grievously . . . for the commission of

crimes of which he was innocent. He was branded as a convict, given a prison number and assigned to a felon's cell. He was deprived of his liberty and civil rights. He was degraded in the eyes of his fellowmen. His mental aguish was great by reason of his separation from society and from his wife and family and in being deprived of the opportunity to afford them a living which they were compelled to seek from public authorities. He suffered the miseries of prison life, and his confinement was doubly hard because he was innocent."

If an innocent convict who has not been vindicated does go straight after leaving prison, he may find himself up against a fiendish situation: The police, suspicious of ex-cons, may pick him out as the perpetrator of another crime of which he is also innocent. If indicted he goes to trial with a terrific handicap. For (as we saw) when an accused with a prior conviction testifies, in most courts the prosecution has the right to use that fact most damagingly against him, and consequently his lawyer will probably advise him not to take the stand. If he accepts that advice, the jury is likely to believe him guilty —and once more he will be unjustly imprisoned. This outcome could be justified only on the principle that one act of injustice deserves another. It has the qualities of a Greek tragedy.

CHAPTER SIX

Maurice Taff—Rudolph Sheeler

1

On April 4, 1931, in St. Louis, Missouri, Helen Benderoth and Mae Schoenfeld were spending a routine business day in their dry-goods store, when two young men, each with a revolver in his hand, came into the shop. The bandits took the day's profits from the cash register and with no interference from the frightened women made their getaway. The women promptly notified the police, giving a description of the criminals.

A month later, on May 9, nineteen-year-old Maurice Taff, walking down the street with a friend, eighteen-year-old William Eiseman, was accosted by the police. The officers arrested Eiseman and Taff for the dry-goods-store robbery.

At police headquarters Taff and Eiseman, placed in the line-up, were immediately identified by the two women. That evidence sufficed to bring the boys to trial, but the police, perhaps thinking that the witnesses would not testify convincingly, sought additional evidence from the prisoners themselves.

After a short interrogation, Eiseman confessed. But, although he stated that Taff did not participate in the holdup, he refused to name his accomplice. The police, therefore, interrogated Taff. But, since Taff was innocent, his confession proved more difficult to obtain. The police subjected him to forty hours of questioning, he later said, during which he had little food or sleep. With his point of view considerably distorted by excessive hunger and fatigue, Taff finally confessed. His confession narrated details about the crime supplied by his interrogators.

Both Eiseman and Taff were indicted. Eiseman pleaded guilty. But Taff, repudiating his confession, pleaded not guilty. He went to trial on November 23.

The prosecutor called two witnesses, Mrs. Benderoth and

Mrs. Schoenfeld. Each testified that Taff had been one of the robbers who had held up the store. Mrs. Benderoth said she "would know him out of a hundred." The prosecutor then put Taff's confession in evidence. That typewritten document, signed by the defendant (identical, word for word, with Eiseman's), stated that Taff met Eiseman on the afternoon the robbery occurred; that they rode around a while and talked; that Eiseman showed him a revolver; and that they then planned the holdup. They passed the dry-goods store (so the confession read), parked the car a half block away, entered the store, but, seeing customers there, stayed only long enough to buy a spool of thread; they soon returned and committed the robbery. That evidence ended the prosecution's case.

Taff testified that he was innocent. He described the coercive method by which his confession had been obtained. Eiseman testified that Taff did not take part in the robbery, but Eiseman still refused to name his accomplice. The superintendent of schools in the county in which Taff lived and the superintendent's son each swore that he had seen Taff in Waynesville, miles from St. Louis, at the time the crime took place.

The jury, believing the prosecution's witnesses, returned a guilty verdict. On December 15 the judge sentenced Taff and Eiseman each to ten years in the reformatory.

Six months elapsed during which Eiseman brooded on Taff's innocence. Finally, in June 1932, he decided to name his accomplice so that Taff would be released. He told the warden of the reformatory that his fifteen-year-old brother, Donald, had assisted in the robbery. Donald, brought to juvenile court on September 20, pleaded guilty.

The warden, the prosecutor, and the judge who had sat at Taff's trial joined in a petition addressed to the Governor, recommending clemency. On December 12, 1932, after Taff had served a year's prison term, the Governor unconditionally pardoned him.

* * * * *

On November 23, 1936, in northeast Philadelphia, a gunman shot and killed James T. Morrow, a police officer. Philadelphia's homicide squad immediately engaged in several frantic actions to find the murderer.

Sometime during that November the police detained one Joseph Broderick for questioning. On December 9, he signed

a confession to the crime. But, for reasons not disclosed, Broderick was never brought to trial.

On May 17, 1937, the police obtained another confession, this time from George Harland Bilger, a criminal well known to the authorities. He claimed that a police officer, Alfred Gebhardt, had been his accessory.

On June 24, 1937, Bilger went to trial, pleading not guilty because of mental irresponsibility. The jury, finding Bilger sane and guilty of murder in the first degree, fixed the penalty at death. But presiding Judge McDevitt, for some reason not happy with the sentence, granted Bilger a new trial, at which he pleaded guilty. The judge sentenced him to life imprisonment.

On June 29, Officer Gebhardt went to trial as an accessory to the murder. The jury acquitted him.

When Bilger went to prison, the police closed the file on the Morrow murder. But two years later Judge McDevitt, still not satisfied with the disposition of the case, suggested to Captain Richardson of homicide that he resume an investigation of the policeman's death.

On February 6, 1939, a criminal known as Jack Howard, alias Batten, alias Stitch, was shot and killed in a gun fight with the police. Because of evidence found on his body and in his home the police realized that Howard had been Morrow's murderer. But with Howard beyond punishment, the police looked for another culprit, preferably one of Howard's associates.

Rudolph Sheeler, born in 1916, spent his childhood in Pennsylvania's orphanages, as his father was a patient in a mental hospital where his mother earned her meager living scrubbing floors. In June 1931, age fifteen, Sheeler went to live with his divorced sister, Elizabeth Morgan, in Philadelphia. A few months later Elizabeth met Jack Howard, with whom she became friendly.

Through his close association with Howard, Sheeler received a thorough training in the methods of the underworld. He assisted Howard in crimes ranging from petty larcenies of milk or bread, and purse-snatchings from women on the highways, to armed robbery. Occasionally, on his own, he engaged in petty thefts.

Sheeler followed this career from the time he met Howard, in 1931, until May 18, 1935. On that day Howard shot and killed a police officer named Henningson. The next day,

when Sheeler learned that Howard had committed murder, he immediately severed relations with the murderer, and abandoned his own criminal career. Leaving Philadelphia, he moved to New York City, where he found a job in a restaurant. In September 1936 he married. Friends of the young couple agreed that Mrs. Sheeler's influence on her husband was for the good. A year after the marriage the Sheelers had a child.

On February 16, 1939, Sheeler, with a day off from work, went to Philadelphia to visit his sister, Elizabeth, at that time a patient in St. Mary's Hospital. The Philadelphia police were then questioning Howard's associates in an effort to connect one of them with the Morrow murder. Knowing Elizabeth's relationship with Howard, the police kept her under close surveillance at the hospital. As Sheeler was leaving St. Mary's, the police, not bothering with a warrant, took him into custody. They booked him under a fictitious name, in effect holding him incommunicado.

On the first day of his arrest the police subjected Sheeler to seven hours of steady questioning, in an effort to get him to confess to the Morrow murder of 1936, and also to the robbery and shooting of May Baxendale in that same year, a crime the police knew Howard had committed. But Sheeler refused to admit to these deeds he had not done. However, he did tell the police about his criminal association with Howard, which had ended in 1935. The police, bent on getting Sheeler to confess to the 1936 crimes, had no scruples about how the confession was obtained. They turned to other methods to persuade Sheeler to "co-operate."

During the next few days they "interrogated" him for a total of approximately forty-five to fifty hours. The "questioning" took two forms.

The first consisted of a series of physical assaults in which groups of officers took turns. When one set of police became exhausted, another set resumed the brutal beating of the helpless man. They gave Sheeler an occasional interval to rest. During such an interval he had an uninterrupted opportunity to feel the awful impact of the pain coursing through his broken body and to comprehend that the beating would not stop until he died or had confessed.

The second method of persuasion took a purely verbal form. The police told Sheeler that, if he did not confess, he would be prosecuted for the crimes to which he had admitted, as well as for the Morrow murder and the Baxendale

robbery. They said that he could be sentenced for as long as one hundred years for the crimes of his early career alone, knowing that he did not realize that because of the statute of limitations he was immune from prosecution for those acts.

They did not let him know on what day the Morrow murder had occurred. Instead they told him that they had checked his employment record at the restaurant and had discovered that the crime occurred on his day off from work. They said that they had located a witness who could identify him as someone who had then been in Philadelphia.

On February 23, a week after his arrest, the police placed Sheeler in the line-up, where he was identified by one Hugh Quinn, the "witness," actually a stool pigeon acting on orders from the police. After this "identification," the police took Sheeler back to his cell for further "questioning."

This time they repeated their threats of prosecution, adding that, if he did confess to the Morrow and Baxendale crimes, they would arrange for his release from prison a short time after sentencing.

Meanwhile Sheeler's wife, thoroughly alarmed by his failure to return home, went to Philadelphia to discover what had happened. Finding no trace of Sheeler, Mrs. Sheeler engaged the services of two Philadelphia lawyers, Maurice and Bertram Weinberg, who inquired about Sheeler at the morgue, at all the hospitals, and at the police stations in every precinct. The police informed Mrs. Sheeler and her lawyers that they had no record of a Rudolph Sheeler having been taking into custody. That was the literal truth, since they had him under a fictitious name. However, on February 20, four days after his arrest, his wife chanced to see Sheeler in the corridor of City Hall, walking between two police detectives. One of the Weinbergs, identifying himself as Mrs. Sheeler's attorney, immediately asked to see the prisoner. The police refused, merely saying that they had Sheeler "on ice." The Weinbergs then filed a petition for a writ of habeas corpus returnable on February 24.

Before that date Sheeler broke. On February 23, a week after the police had taken him prisoner, Sheeler confessed that he had been Howard's accomplice in the Morrow murder and the Baxendale robbery. The statement he signed described the commission of those crimes, taking a rather vague narrative form consisting of a combination of facts supplied by the police, of details of his past experience in crime, and of other

circumstances he merely thought might make his confession more convincing.

After he signed the confession, the police did their best to improve his appearance, which had undergone a drastic change as a result of his treatment at their hands. But the signs of physical violence were nakedly apparent on his face.

At the hearing a police captain testified that, since the investigation against Sheeler was now complete, the police were ready to bring Sheeler before a magistrate for a preliminary hearing. As the captain further stated that the police would place no obstacle in the way of Sheeler's representation by counsel at any time, the court dismissed the habeas corpus petition.

A preliminary hearing before Judge McDevitt followed immediately. The captain testified that Weinberg was "a man [who] don't understand criminal law, goes out snatching prisoners . . . keeps trying to interfere with us."

The rest of the captain's testimony concerned itself with the description by a police officer, Atkins, of a man seen at the scene of the murder. The description, the captain said, fitted Sheeler to a "T." (In fact Atkins had referred to a person known not to be involved in the murder. After the captain's testimony Weinberg examined Sheeler about his confession:

Q. Did you volunteer anything to the officers? Just answer "yes" or "no."

A. No.

Alarmed by that reply, the captain abruptly asked Judge McDevitt for more time to investigate the case. Judge McDevitt granted the request.

In spite of Weinberg's strenuous efforts the police prevented him from consulting with his client. They continued to guard their prisoner closely; they were constantly on hand to see that his terror did not abate.

Undeniably every human being has his breaking point. Sheeler had long since past his. When he saw the futility of Weinberg's efforts against the omnipotent police, he yielded utterly. He signed a statement blaming the "influence of Attorney Weinberg" for his assertion at his hearing that his confession had not been voluntary.

Following the signing of that statement, the police treated Sheeler well. They gave him frequent permission to visit with his wife and child. They even took him out for an occasional

meal or for an automobile ride.

On March 17 he was indicted for the murder of Morrow and the Baxendale robbery. Arraigned on March 24, he pleaded guilty to both charges. But no sentence was ever imposed on the Baxendale robbery charge. Judge McDevitt set March 29 for the trial, before himself and two other judges, on the murder charge.

Previously, on March 24, at the time of his guilty plea, Sheeler had signed an affidavit "of destitute circumstances" and requested that the court assign him counsel. Judge McDevitt appointed G. J. Dale and Robert Duffy, both reputable members of the bar, to represent the prisoner.

Judge McDevitt did not notify these attorneys of their appointment until noon of March 28, the day before the trial. Dale and Duffy interviewed Sheeler alone in his cell at six o'clock that night. But although the police were absent from the cell, they occupied a vivid place in Sheeler's mind. He assured his lawyers that he had voluntarily confessed and pleaded guilty. Having no reason to doubt his word, Dale and Duffy did not think it necessary to ask that the trial be delayed so that they might have time to examine the confession. They attempted only to prepare Sheeler to testify in a manner that would arouse the sympathy of the court.

On March 29 the trial came on before the three-judge court. Several policemen testified, saying that they had checked the prisoner's confession and found it accurate. They also stated that Sheeler had been identified by "a respectable citizen . . . whose name we are not disclosing," as the man seen near the murder scene. They then offered Sheeler's confession in evidence, after which Sheeler testified in accord with the confession.

However, one of the judges noted several discrepancies between the written confession and Sheeler's oral testimony. The hearing was adjourned to the next day. In that interval Sheeler, still under close guard by the police, signed another confession, which matched his testimony.

On March 31 the court, now satisfied with the confession, sentenced Sheeler to life imprisonment. On April 1, Sheeler began to serve his term. Shortly afterward George Harland Bilger, previously convicted of the Morrow murder, was pardoned and released.

Sheeler waited out six prison years, evidently in the belief that the police would make good their promise to set him free.

Finally, in 1945, realizing that they had no such intention, Sheeler wrote to the prison chaplain. His letter detailed the methods used to obtain his confession, which he now repudiated.

The warden, sensing that Sheeler spoke the truth, saw that his letter was read by higher authorities. But no one took decisive action until the matter came to the attention of Professor Louis B. Schwartz, of the University of Pennsylvania Law School. Through his masterful and untiring efforts the truth finally became public. But the facts, denied by the police, were difficult to prove. Schwartz was not able to obtain evidence for a new trial until 1948. In September 1950 his motion for a new trial was denied. Meanwhile, in April 1950, with Schwartz and another lawyer, Raymond J. Bradley, as his counsel, Sheeler filed a petition for a writ of habeas corpus in the Pennsylvania Supreme Court. This was after Sheeler had spent twelve years in the penitentiary, during which, in 1949, Mrs. Sheeler died.

The Supreme Court said that Sheeler's petition "raised . . . important issues," which an upper court had no facilities to investigate. Accordingly the Supreme Court referred the matter to Judge Louis E. Levinthal of the Court of Common Pleas in Philadelphia. He was directed to hold a hearing and to return to the Supreme Court a record of the hearing together with his findings of fact.

After such a hearing Judge Levinthal wrote an opinion in which he went into the facts at length. About the confession he said in part, "Sheeler's account of the Baxendale and Morrow crimes, both in his 'confession' and in his self-incriminating testimony, was palpably false and inconsistent with facts known or available to the police. The police explicitly informed the court . . . that the 'confession' had been checked and found to be true. If the 'confession' had actually been checked with reasonable care and intelligence, the following inherent contradictions would have been revealed:

(a) The confession described the Baxendale robbery and shooting as having occurred the same evening as the Morrow murder and shortly preceding it. In the statement Sheeler said that he and Howard went to the site of the Morrow crime because the Baxendale crime netted them only about $10. Actually more than two months intervened between the two crimes.

(b) Sheeler testified that he and Howard went to the vi-

cinity of the Sears, Roebuck plant [where the Morrow murder took place] to rob shoppers of the store. The Morrow shooting occurred at about 6:30 P.M. The store had closed at 5 P.M. on that day.

(c) Sheeler's "confession" and his testimony indicate that Howard shot Morrow in the stomach, face to face. The coroner's physician, who was not produced at Sheeler's trial, had on three prior occasions described Morrow's gunshot wounds in detail, indicating that he was shot from behind and the side, not in front. . . .

(d) The "confession" places the Morrow murder at a point adjacent to the parking lot, whereas the actual scene of the crime was several hundred feet distant.

(e) The "confession" mentioned street and house addresses which the police knew, or should have known, to be false. . . . Sheeler gave an address on North Phillips Street as the home of one Grekowski with whom Howard lived in November 1936, and as the place from which Howard emerged to join him on the day of the Baxendale and Morrow crimes. Although Howard had stayed at Grekowski's house on Orkney Street for 10 days in the middle of 1936, the uncontradicted testimony in this case establishes that the house Sheeler referred to was where Grekowski had resided from 1932 to 1934, and this house was torn down two years prior to the Morrow murder.

(f) In the "confession" it was stated that Howard's revolver was taken from an officer robbed by Howard in Brooklyn in 1934 or 1935. During the course of the hearing before me, this statement was checked by the police of New York City, at the insistence of counsel for petitioner, and found to be unsubstantiated.

(g) Most important is the fact that if the police had properly checked with the known employer of Sheeler (as they had told both him and the court . . . they had done) they would have learned that he could not possibly have been in Philadelphia when the Baxendale and Morrow crimes were committed. The manager of the White Castle restaurants clearly explained the employment records of his company, which were offered in evidence. It is definitely established that Sheeler worked in the Upper Bronx, New York, on September 19, 1936 (the date of the Baxendale robbery) for ten hours from 7 A.M. to 5 P.M. and November 23, 1936 (the date of the Morrow murder) also for ten hours, beginning no earlier than 5 P.M. and no later than 8 P.M. It would have been

physically impossible for Sheeler to have been at the Sears, Roebuck plant at 6:30 P.M., to have fled on foot several miles, taken a trolley car to Fifth Street and Roosevelt Boulevard, hitch-hiked to Rahway by truck, then to New York City by auto, and then gone by subway to the Upper Bronx [as his "confession" narrates] and still arrive at his place of employment no later than 8 P.M. that evening. . . ."

About the identification of Sheeler by the stool pigeon Judge Levinthal said:

"The police testified at the Sheeler trial that Sheeler had been identified by a 'respectable citizen . . . whose name we are not disclosing' as a young man who was picked up by the 'witness' while Sheeler was in flight after the Morrow murder. The police knew, or should have known, that this unidentified 'respectable citizen' was one Hugh Quinn, alias Mitchell, a disreputable criminal who had been convicted of many grave offenses and who, when not in prison, was a professional police informer. The police also knew, or should have known, that Quinn had given a statement to the New York police in November 1936, which was inconsistent in essential details with Sheeler's 'confession' and testimony, and that his description of the hitch-hiker could not have applied to Sheeler."

Judge Levinthal made this comment concerning the motives of the police responsible for their use of the third degree:

"An examination of the Sheeler trial transcript indicates that the law enforcement officers, in seeking to establish the guilt of Sheeler, the known associate and accomplice of Howard, were particularly anxious to free Bilger and to clear the reputation of their fellow officer Gebhardt. The impression created from a reading of the record of the Sheeler trial is that the entire proceeding was in the nature of a vicarious prosecution of Howard, the dead desperado, for the purpose of exculpating Bilger, the living convict."

About a fundamental question in the case the judge wrote:

". . . the issue [is not] whether he is entitled to a pardon. His innocence of the murder for which he was sentenced, his pathetic background and his remarkable self-improvement . . . naturally arouse our sympathy, despite the many crimes Sheeler admittedly committed for which he was never punished; but we are not concerned with the question of clemency. The sole inquiry here is whether Sheeler was

denied his constitutional rights. If so, he is entitled to relief as an act of justice, not of mercy."

On March 29, 1951, the Pennsylvania Supreme Court, on the basis of Judge Levinthal's findings, decided that Sheeler had been deprived of his constitutional rights by the Philadelphia police, set aside his conviction, and ordered a new trial. On April 5 of that same year Sheeler was arraigned in the Quarter Session Court of Philadelphia County. At this proceeding Sheeler pleaded not guilty. The case was called for trial on May 1.

Judge James G. Gordon presided at the trial. After he heard the new evidence, the judge directed the members of the jury to acquit. Before dismissing the jury Judge Gordon said, ". . . for twelve long years, the lash of punishment has been laid upon him [Sheeler] in a felon's cell. It is an ugly picture to contemplate—one to inspire wonder, alarm and deep resentment in the hearts of decent men.

"The story of this outrage has but recently been revealed. Sheeler's plight finally came to the attention of his present counsel, Mr. Schwartz . . . [who] has not only restored liberty to a friendless and persecuted man, but [who] has also performed a notable service to the public and to the cause of justice. . . .

"The wrong that was worked against Sheeler cannot be righted by any perfunctory verdict of acquittal. Its sinister implications are broader and deeper. Considered largely, it poses a grave threat to the personal safety and liberty of us all. No man is safe if the police-power is to be abused with impunity, as it was here. When wisely and lawfully exercised, the police power of the state is a necessary and beneficent force in promoting the welfare and happiness of a people, preserving the public peace and protecting the citizen in the full enjoyment of his dearest possessions, his life and his liberty. In the hands of arrogant and cruel men, however, this same power becomes a terrible instrument of governmental tyranny and oppression, and it is only through the abuse of that power that despotisms rise and flourish, that liberty vanishes and that the safety and happiness of a free people are destroyed. Fortunately, Sheeler's fate is a rarity in the administration of justice in America, but it is an ominous counterpart of what occurs daily behind the Iron Curtain.

"The lessons of this case will not be learned, if we are cynically to shrug our shoulders, indifferently go about our busi-

ness, and promptly forget it. The tragedy of it will be immeasurably increased, unless it leads to reforms and improvements in police practice which give reasonable promise that such shocking incidents shall never be repeated. . . ."

The freeing of Rudolph Sheeler ended one of the most shameful cases ever brought to public notice. Although the majority of our police do not use the third degree, those officers who do act on the belief that their brutalities will never be disclosed. All too often their belief is justified.

2

That the third degree violates rights fundamental to our system of justice, and embodied in our constitution, is glaringly apparent. Specifically it violates the right to personal freedom and immunity from unlawful arrest and detention; the right to bail; the right to be immune from assault and battery; the right to be presumed innocent until proved guilty and not to be punished until convicted; the right to employ counsel who shall have access to his client at all reasonable times; the right to be protected against abuses of one's rights while awaiting trial.

These rights the police have not always zealously protected, if we can judge from our court records. Those records disclose that not seldom have the police kept arrested men incommunicado, with no contact with friends, no advice from lawyers—in effect, kidnaped by the police. We hear of the merits of the rubber hose; it inflicts severe pain but leaves no traces. The same is true of the "water cure." The policeman lays his victim down and slowly pours water into his nostrils. He suffocates—or he confesses. Drilling deep into the nerve of a tooth has proved effective. A police captain in his memoirs describes two useful methods: "A sharp, but not heavy blow on the skull, repeated at regular intervals, so that the regularity of the blows arouses anticipation which increases the torture; assuring the suspect that he will not be hurt, then suddenly felling him with a blow from behind with a club or a slab of wood, followed by further sympathy and reassurance when the man revives, only to have the same thing happen again, the man never seeing who strikes him. . . ." There is, too, the sweatbox, and the variant where the victim is alternately sweated and frozen. Powerful lights are also persuasive, turned full on the victim's face, or switched on and off, on and off.

But policemen have discovered that they need neither

intricate devices nor violence. The easiest way to persuade a man to confess to whatever you want is to deprive him of sleep beyond the point of normal exhaustion, questioning him endlessly. As a Louisiana judge put it, "I myself might make a false confession of having murdered my own father if I were kept awake and prodded with questions."

How common are these practices? No one really knows. Because an accused officer will almost always deny that he indulged in them, and because they are conducted in secret, statistics are difficult, almost impossible, to get. Yet it is common knowledge that the third degree, in recent years, has been applied in almost every state of the Union. Numerous trial records mention instances where it has been exposed, and an American Bar Association committee said in a report made in 1930, "For every one of the cases which . . . find a place in the official reports, there are many hundreds and probably thousands, of instances of the use of the Third Degree in some form or other." President Truman's Commission on Civil Rights came to practically the same conclusion in its report published in 1947. This conclusion is not surprising when one learns that a police commissioner of a large city publicly declared that a policeman "should always remember that a bad confession is better than none, and that as a last resort he may believe that he is justified in using force 'to obtain a confession.' "

The Bar Association committee observed that prosecuting attorneys "are frequently participants in lawless efforts to obtain confessions." So sweeping a statement may well be unfair. But without doubt some prosecutors have authorized, or at least winked at, the third degree. So we have this sorry spectacle: Some of the very officials we select to protect us against crime have themselves, by engaging in this illegal conduct, become criminals.

So shocking a fact as this has shocking consequences. The torturing of men can but brutalize the torturer. More, it compels him to turn perjurer: When called as a witness to a coerced confession he is obliged to swear falsely that there was no coercion. Many policemen in any police force are decent officers who deplore the use of the third degree. But in a police force generally addicted to it they cannot effectively object. And its use even by a small minority casts suspicion on all policemen. Our popular detective fiction and movies attest to a widespread belief that the third degree is standard police practice. Can we risk such public cynicism about official

flouting of our major democratic traditions?

Apologists for the third degree say that the police resort to it only in "emergencies," and that "no decent man is ever beaten up in a police station." They imply that such coercion is applied solely to habitual criminals or to men whose guilt is already clear. But is this true? Our court reports prove otherwise.

Some Americans approve of the third degree because they assume that it means merely that the police mishandle gangsters to make them admit their crimes. But it is precisely those professional criminals who are ordinarily immune from police violence because they have powerful organizations back of them, with lawyers ready to "spring" them promptly, by writs of habeas corpus. Occasionally, in the case of a lurid crime, when the public clamors for a solution, a prominent citizen may be subjected to the third degree. But President Truman's Commission on Civil Rights Committee accurately said, "Most of the victims . . . are ignorant, friendless persons, unaware of their rights and without the means of challenging those who violate those rights." As Dean Roscoe Pound once pointedly remarked, "No rich man is ever subjected to this process to obtain proof in violation of anti-trust legislation, and no powerful politician is thus dealt with to obtain proof of bribery and graft."

Those who acquiesce in the third degree are saying two things, in effect: That the police, in order to detect crime, may themselves operate outside the law—and that civil liberties are, on the whole, the exclusive privilege of professional criminals and of the so-called upper classes.

As a matter of fact, none of us is safe. When a police official declares that he tortures no one but criminals, he unwittingly exposes the real menace of the third degree: He is asserting the police have a right, without a trial, to determine the guilt of an arrested person. Once we concede any such right to the police, we potentially endanger all men. For then we authorize the police to torture anyone they, in their uncontrolled discretion, decide is a criminal.

Repeated and unredressed attacks on the constitutional liberties of the humble tend to destroy the foundations supporting the constitutional liberties of everyone. The test of the moral quality of a civilization is its treatment of the weak and powerless.

It is futile to suggest that, as a remedy, we "Pass a law." There are already laws aplenty. A policeman who employs

such criminal means can be indicted and tried for his crime. But, as history teaches, prosecutors, for obvious reasons, rarely ask the indictment of policemen on account of such criminal behavior. True, the victim of the third degree can sue the offending police officer for damages. But almost any lawyer will advise against such a suit. He knows the difficulty of proof in most cases, since the rubber hose or mental torture leaves no marks. The lawyer knows, too, that a money judgment adverse to a policeman is usually worthless, for he has no money. In some states the government is theoretically suable for the results of police brutality, but such a suit does not often succeed. The final and chief reason for the infrequency of civil suits is the poverty of most of the victims; even when they know their rights—many do not—most of them cannot afford the expense of litigation.

All these measures, then, usually represent but paper remedies. Our courts, to be sure, when they have before them proved instances of the third degree, denounce this barbarism, eloquently invoking the Constitution. But these occasional judicial sermons have little value as a deterrent. Indeed, it has been suggested that these diatribes by the judges have merely tended to drive the third degree underground "where it has challenged the ingenuity of those who practice it, to do so free of detection." At any rate the courts, since they encounter but a small fraction of these loathsome police usages, lack the power to stamp them out.

What, then, is the answer? The British—who, to our shame, call the third degree the "American method"—have avoided the problem by the establishment of a police corps trained to eschew brutality and violence, yet whose law-enforcement record is excellent. In their work the British police have a valuable adjunct in the respect of the public, willing therefore to co-operate with them.

Such co-operation—often essential to the discovery of criminals—American police often cannot command, thanks to the public's mistrust in their integrity. As this mistrust stems from the common (although mistaken) belief that American policemen invariably use brutal and criminal methods, the third degree actually augments the number of undetected crimes.

Yet we need not go to the British Isles for revised procedures. We can look to the methods of the most efficient American police force, the Federal Bureau of Investigation. J. Edgar Hoover states, in writing of his F.B.I. school, "Spe-

cial Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice. Duress of any type is absolutely forbidden. Any Special Agent guilty of such conduct is subject to immediate dismissal from the service."

But how then, cynics will ask, does the F.B.I. go about the business of detecting crime? For that question Hoover has a convincing answer: "Civil rights violations are all the more regrettable because they are so unnecessary. . . . Technical crime-detection methods have greatly reduced arbitrary intrusions on civil liberties. The apprehended suspect 'won't talk': Third-degree methods, the ill-trained officer might think, perhaps a severe beating, will force a confession. But the trained officer, schooled in the latest techniques of crime detection, will think otherwise—he will go to work, locating a latent fingerprint, a heel-print in the mud, or a toolmark on the safe. . . ." The F.B.I. training school teaches its agents the newest and best crime-detection techniques. At the same time the instructors dwell on the fact that no decent policeman will ever stoop to the inefficient, degrading, and un-American third degree. The F.B.I. instantly dismisses, in disgrace, any of its agents caught relying on this short cut. "A crime of this nature," says Hoover, "if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism."

The F.B.I. spreads its gospel—and its methods—among the city and state police who attend its National Police Academy, and some states and cities have such schools of their own. However, to date, in large areas of this country the police so educated are but a handful.

Clearly the way to end police brutality lies in something like F.B.I. training—in its ethics and its techniques—for all our police. Only when we have trained all of them in improved methods of crime detection, and taught them to respect the civil liberties of every citizen, will we cleanse the U.S.A. of the infamy of the third degree.

CHAPTER SEVEN

Eighteen Cases (1918-48) Briefly Described

In 1919, John Dougherty, a collector for a New Jersey baking company, charged a man named Louis Benevente with robbing him of $192 of the company's cash. Brought to trial, Benevente was convicted on Dougherty's sole testimony. The judge sentenced the prisoner to a term of from five to fifteen years. After a five-year imprisonment Benevente was paroled. Changing his name to Bennett, he moved out of the state with his wife and two children. Twelve years later Dougherty confessed to the police that he had perjured himself at Benevente's trial: No money had been stolen, but Dougherty, having lost ninety dollars in a dice game, had accused Benevente of robbery in order to explain the loss. The statute of limitations saved Dougherty from prosecution for perjury. On October 3, 1939, the New Jersey legislature awarded Benevente $5000.

In 1919, in Detroit, Michigan, a prosperous farmer, Luca Tirpula was shot and killed. Alexander Ripan, charged with the murder, was brought to trial and convicted mainly on this evidence: The bullet taken from Tirpula's body dropped easily through the barrel of Ripan's revolver, which had been fired recently. Ripan was sentenced to a life term. In 1929, after he had served ten years, he escaped from prison, remaining at large for six years. In 1935 a former fellow convict, recognizing him, reported him to the police. Back in the penitentiary, Ripan was subjected to severe punishment for his escape. Meanwhile Crane, the prosecutor who had brought Ripan to trial, now not satisfied with its results, had been working on the prisoner's behalf. In 1939, Crane obtained a new trial for Ripan, at which an expert testified that, in the light of recent discoveries in the ballistics field, the very evidence which had sent Ripan to the penitentiary now proved him innocent: A bullet fired from a revolver could not be reinserted in the barrel of that same weapon without great

difficulty. The judge sitting at the new trial dismissed the murder indictment. Ripan had been fourteen years in prison.

On August 12, 1925, Ward Pierce, the paymaster of the Art Metal Shop plant in Buffalo, New York, was robbed and killed. Edward Larkman, a family man with a police record of several petty crimes, was arrested for the Pierce murder. The police knew that the killer had worn dark glasses during the robbery. Larkman was not placed in the police lineup. He was forced at police headquarters to stand alone under a bright light and to wear a pair of dark glasses, and was thus shown to an eyewitness to the crime, Dorothy Littleworth, who identified him. At his trial she testified that she had recognized him at police headquarters even though she had there seen his profile for only three seconds and his full face for only two. Larkman offered an alibi as his defense. The jury asked for information concerning the witness's identification of Larkman at police headquarters, but the method used by the police was not revealed. The jurors, after deliberating for forty-three hours, returned a guilty verdict. The judge sentenced Larkman to die in the electric chair. The court of appeals affirmed the conviction without opinion by the court's majority, but with a dissenting opinion by two judges, who felt that the identity of the defendant had not been established beyond a reasonable doubt. On the night of January 13, 1927, shortly before Larkman's execution was scheduled to take place, Governor Alfred E. Smith, as is customary when there has been a dissent, commuted the sentence to life imprisonment. The Governor said that, should a later disclosure prove Larkman innocent, "the State would be helpless if [he] were dead." In April 1929, Anthony Kalkiewicz, a Buffalo gangster, arrested for another crime, confessed that Pierce had been murdered, not by Larkman, but by a gang of five men, of which he, Kalkiewicz, had been one. Larkman applied for a pardon on the basis of the gangster's confession. Governor Roosevelt appointed Dean Carlos C. Alden to investigate the case. On March 24, 1930, his investigation complete, Alden recommended that Larkman be granted a new trial, predicting that Larkman would be acquitted, since, in his opinion, the new evidence pointed to Larkman's innocence. However, the motion for a new trial was denied on the ground that new evidence had not been presented within a year after Larkman's conviction. In June 1933, Larkman renewed his application for a pardon to the

new Governor, Herbert Lehman. Lehman appointed Alden to reinvestigate the case. This time Alden recommended a pardon, mainly on the basis of the method of identification used by the police, a fact about which Alden had just learned. On April 18, 1933, Governor Lehman unconditionally pardoned Larkman, who had spent nearly eight years in prison, four of which he served after another man had confessed to the crime for which Larkman had been sentenced.

In 1929 twenty-two-year-old Robert Coleman, a salesman, lived with his eighteen-year-old wife and their small infant in Clayton County, Georgia. On March 14, returning home from a routine working day, Coleman found his wife the victim of a brutal murder. Near collapse, Coleman summoned the police, who immediately arrested him as the Number One suspect in the case. To no avail Coleman begged the police to question a Negro, Starks, whom Coleman suspected of the murder. The police, discovering the murder weapons—a poker, a flat iron, and a chunk of wood—inside the house, reasoned that Coleman must be the killer, since an outsider would have removed those clues. The police also found Coleman's overalls, used by him for household chores, freshly washed but still showing stains that looked like human blood. Brought to trial in May, on that circumstantial evidence Coleman was convicted and sentenced to life imprisonment. Three years later a condemned convict, Davis, reported to the authorities that another prisoner, Starks (the man Coleman had suspected of the murder), had said that he had killed a woman in Clayton County in 1929. An investigation disclosed that in truth Starks had slain Coleman's wife. On April 14, 1933, after Coleman had served four years, the Governor granted him an unconditional pardon. On March 27, 1941, the Georgia legislature appropriated $25,000 to compensate this wrongly convicted man.

In 1929, on the streets of Romulus, Michigan, four gunmen robbed and killed a candy salesman in the presence of two witnesses. Gerald Growden, Lawrence Hein, Harry Lancaster, and Peter Simon were charged with the murder in October 1931. The last three confessed, saying that Growden had not participated in the crime. Later, however, the three repudiated their confessions. All four men were brought to trial. During the trial Lancaster and Hein interrupted the testimony to plead guilty. In the jury's absence these two said that Growden was innocent. However, as two

witnesses had identified Growden, he was found guilty by the jury and was sentenced to a life term. In June 1932, William Burroughs, arrested on another charge, confessed that he, not Growden, had been the fourth criminal. On June 18 the charges against Growden were dismissed. After serving nine months he was released from prison.

On March 22, 1930, the police arrested Alvernon Lytle, a married man living with his wife and a small child in Superior, Nebraska. They charged him with a bank robbery that had taken place in Minden, Nebraska. Five witnesses identified Lytle as the bandit who, on entering the bank, had threatened to blow it up with sticks of dynamite tied around his waist if the bank officers did not hand over the money in the till. At his trial Lytle offered an alibi defense. The prosecution was willing to strike a bargain: If Lytle would plead guilty, the state would recommend a sentence of one year. Lytle refused to change his plea. The jury found him guilty. The judge sentenced him for a term of not less than twelve but not more than fifteen years in the state prison. Lytle appealed to the Nebraska State Supreme Court but, since the trial had been fair, that court affirmed. In January 1932 the police arrested a bank robber who confessed to the crime for which Lytle had been convicted. Lytle and the criminal looked strikingly alike. On March 8, 1932, the Board of Pardons and Paroles pardoned Lytle. While in prison he had lost all his property. The next year the state legislature awarded him $2500 as compensation.

In 1933 three gunmen robbed the bank of Berry, in Berry, Alabama, of $5000. Glenn Davis, Bill Hathaway, and Herschel McCarn, coal miners, were arrested and identified by the witnesses to the crime. Brought to trial, they were convicted. The judge sentenced them each to not less than ten and not more than twenty-five years in the penitentiary. Seven years later one of the men who had actually participated in the robbery confessed. He named his accomplices, exculpating the men in prison. The Board of Pardons and Paroles pardoned those three innocent men, stating that the error had been caused by their "remarkable resemblance" to the criminals.

In the early morning of July 9, 1933, a major fire broke out in a college fraternity house in Washington, D.C. The ensuing

investigation indicated arson by the use of gasoline. The police arrested two fraternity members, Edward Parlton and Alfred Smith, as the arsonists. At their trial the prosecution relied on circumstantial evidence: The defendants had recently purchased gasoline, which they carried in a milk can later found empty on the premises; a small, apparently separate fire had been discovered in the room jointly occupied by them; they had ample motive, since Parlton was disliked by his fraternity brothers and Smith, the house treasurer, was behind in his accounts. The defendants offered, as an alibi, evidence that they had been absent from the fraternity house all night, a defense supported by several witnesses. Nevertheless they were convicted. While their appeal was pending, Parlton and Smith were released on bail. During that interval Attorney General Homer Cummings, believing that the men were innocent, investigated their alibi. Finding it to be incontrovertible, the Attorney General asked the court of appeals to reverse the conviction. That court, because the trial court had admitted some improper evidence, awarded a new trial. At the second trial the defendants were acquitted.

In August 1935, in Reynolds County, Missouri, a sawmill worker, Raoul Hunter, was killed. There were three people present: Lee Bowles, justice of the peace, Joseph Huett, a lawyer, and Huett's wife. Bowles told the police that Huett had killed Hunter without provocation because of a long-standing political feud. Bowles so testified at Huett's trial. The jury convicted Huett of manslaughter, after which he was sentenced to a five-year term. Seven months later Bowles confessed to the police that he had perjured himself at Huett's trial because Hunter had been his friend and "I hated Huett." Actually Hunter had been gunning for Huett, who had shot him in self-defense. Shortly after Bowles's confession Huett was released.

Thirty-three-year-old Frank Trasco, of Garden City, New York, a salesman for a wholesale butcher, was arrested in January 1935 for misappropriating $265 of his employer's funds. The chief witness against him at his trial was a fellow employee, Charles Braun. After the jury found Trasco guilty, the judge sentenced him to fifteen months' imprisonment. Trasco had served almost his entire term when Braun confessed that he had perjured himself at Trasco's trial. On May 19, 1936, the judge set aside Trasco's conviction and dismissed the indictment.

In May 1935, twenty-six-year-old Arthur O'Connell was brought to trial in Boston for a sexual attack on a thirteen-year-old girl. Convicted on the testimony of the alleged victim and that of her thirteen-year-old companion, who testified that she had witnessed the crime, O'Connell was sentenced to a term of not less than eight and not more than twelve years. In June of the same year the "victim's" companion confessed that the crime had never occurred. O'Connell had merely stopped to talk to the girls for a moment. They had perjured themselves "just for fun." After a month's imprisonment O'Connell was released.

On the evening of May 12, 1936, two women residents of Reisterstown, Maryland, spotted two men loitering near a darkened home in the neighborhood. The loiterers, questioned by the suspicious women, gave evasive answers, after which they got into an automobile and drove away. The police, duly notified, stopped the car. However, the men inside the car beat the policemen to the draw. Taking the officers' revolvers, they escaped. The police found their abandoned automobile near the home of Edward Chalk, a filling-station attendant. He had a police record but had since gone straight. According to Chalk's photograph, taken from the rogues' gallery, he was one of the men who had disarmed the officers. After his arrest Chalk was identified in the flesh by those officers and by the two women who had originally notified the police. Chalk spent five months in jail awaiting trial, during which Joseph C. Martin confessed that he had driven the holdup car. Martin also stated that Chalk had not been his companion in the episode. Nevertheless Chalk was brought to trial and convicted. Pending consideration of Chalk's motion for a new trial, the judge suspended sentence. The police finally turned up Martin's accomplice, and Chalk was released.

In 1936, Raymond Riley, a young lawyer just admitted to the New York Bar, was retained by a Miss Gladys Dyment, administratrix of the estate of Nettie Woods. A short time later Miss Dyment charged Riley with having unlawfully used, for his own purposes, the proceeds of a $235 check, payable to the estate. On that charge Riley was arrested, indicted, and brought to trial. After Miss Dyment's testimony Riley produced a letter she had written to him, authorizing him to cash the check and to keep the proceeds in part payment of a

three-hundred-dollar loan he had made to the estate. Miss Dyment resumed the witness stand to testify that the signature on the letter was a forgery. The defense called a handwriting expert who testified that the signature was Miss Dyment's. The jury, choosing to believe that the letter had been forged, found Riley guilty. The judge sentenced him to a five-year term but suspended sentence on the condition that Riley make restitution of the money. Riley did so. But his conviction had the effect of automatically disbarring him. For lack of funds he could not appeal. Twelve years later, in 1948, Riley brought proceedings to have the conviction set aside. At the new hearing, Riley presented this new evidence, which he had just discovered: During his trial the prosecutor, an assistant district attorney, had consulted Elbridge Stein, a handwriting expert, in an antechamber near the courtroom. Stein testified that the prosecutor had asked him to compare the signature on the letter with other signatures written by Miss Dyment. Stein, having done so, had informed the prosecutor that in his opinion the signature on the letter was genuine. At the new hearing another expert testified that the signature on the letter was Miss Dyment's. Miss Dyment then testified that, although the signature on the letter could be hers, she had not signed the letter. However, she acknowledged an enlarged facsimile of the disputed signature to be her signature. The judge held that, as a state's witness at Riley's trial in 1936, Stein's testimony that the signature was genuine "would have destroyed the probative force of [Miss Dyment's] denial of the authenticity of the signature, which denial undoubtedly influenced the jury . . ." The judge added that the genuine letter would have proved Riley innocent. Finding that Riley had been denied a fair trial in 1936, the judge set aside his conviction and dismissed the indictment.

In March 1937 a gang held up and robbed a retired mailman, George Fleet, in Pittsburgh, Pennsylvania. The police arrested twenty-year-old Anthony Piano as a member of the holdup gang. Identified by the mailman, Fleet, Piano went to trial. After the jury's guilty verdict the judge sentenced the prisoner to not less than two and not more than four years in the workhouse. Months later the police arrested eighteen-year-old Charles Pampana, implicated by other members of the gang. When the police confronted Fleet with Pampana, the mailman immediately recognized Pampana as the boy he

had thought was Piano. Piano's conviction was set aside and the prosecutor dismissed the suit. In October 1937, after seven months' imprisonment, Piano was freed.

In Rock Island, Illinois, in 1940, thirty-six-year-old Roy Eaton, a mine watchman, was convicted of robbing a soap salesman of fifty dollars. At Eaton's trial the victim of the robbery identified him. Eaton was sentenced to prison for from one year to life. He had claimed an alibi as his defense but had not been able to support it, since the witnesses he needed to prove his case were in New Mexico, and he did not have the funds to bring them to Illinois to testify. Eaton had spent sixteen years in the penitentiary when, through the efforts of State's Attorney Bernard J. Moran, his name was cleared. Moran proved that another man, Louis Burrall, had committed the robbery for which Eaton was convicted. In April 1956, Burrall confessed his guilt, and Eaton became a free man.

On the night of January 9, 1942, in Chicago, Illinois, two armed men held up and robbed two taverns. On February 9 the police arrested twenty-five-year-old Pat Metegrano as one of the participants in the holdups. Metegrano was brought to trial on September 22; his lawyer had spent the intervening months unsuccessfully searching for two missing witnesses he needed for the defense. At the trial the state produced two eyewitnesses to the crimes, each of whom identified Metegrano. Metegrano claimed an alibi that could be supported by his brother, who, however, could not appear to testify, since he was in the armed forces, overseas. A man named Fischer, who had previously been convicted as the second bandit, supported Metegrano's contention that he and Metegrano had never seen each other until after the commission of the crimes. A third witness corroborated that testimony. Two men, in whose apartment Fischer and Metegrano had been introduced, were never located. The judge (Metegrano had waived a jury) found the defendant guilty and sentenced him to the penitentiary from one year to life. Two months after Metegrano began his term, the police turned up the bandit the state's witnesses had mistaken for Metegrano—a mistake difficult to explain, since the actual criminal was a blond, and Metegrano a dark-complexioned man. Metegrano then moved to have his conviction set aside. The judge held a hearing, granted the motion, and the prose-

cutor then had the indictment dismissed. After an imprisonment of ten months, including the eight months he spent in jail awaiting trial, Metegrano was released.

In 1946, in Presque Isle, Maine, the police arrested Edward A. Hodsdon on a charge of assault with intent to rape. Identified by the victim of the crime, Hodsdon went to trial. He was convicted and sentenced to a fifteen-year prison term. Six years later, in 1952, a man named Edward Kennison, arrested on another charge, confessed that he, not Hodsdon, had committed the assault for which Hodsdon had been convicted. On August 8, 1952, the Governor granted Hodsdon an unconditional pardon.

In Kansas City, Missouri, in the year 1948, sixty-year-old Edward Oscar, brought to trial for an attempted rape of an eleven-year-old girl, was convicted on the alleged victim's testimony and sentenced to twenty years in prison. Five years later, in 1953, the state's witness confessed that she had perjured herself at Oscar's trial; there had been no crime. In March of 1953 the court set aside Oscar's conviction and found him not guilty.

CHAPTER EIGHT

The Fallibility of Witnesses—Jurors as Witnesses of the Witnesses—Prosecutors and the Tricks of the Trade—"Discovery"—Capital Punishment

1

Assume the most decent police, the most conscientious prosecutor, the fairest trial judge and jury. Still an innocent man may be found guilty. For the fate of the accused depends on the reliability of the testimony of the witnesses the jury decides to believe. How reliable, then, is testimony?

"He lies like an eyewitness," you may hear a lawyer say. That statement is made in jest. But it does point up an important fact: Any witness, being human, may be fallible.

Eminent lawyers and judges have expressed awareness of this fact. A well-known judge said, "It has been profoundly observed, that of all the various sources of error, one of the most copious and fatal is an unreflecting faith in human testimony." Another judge wrote: "It must be admitted that at the present day the testimony of even a truthful witness is much overrated."

An experienced trial lawyer says, "Human testimony has been sweepingly condemned as being largely the product of distorted recollection, unsound inferences from inaccurate observation, and baseless conjecture. This stricture may be too severe, but such investigations as have been made support the view that the usual assumptions of the value of human testimony err on the side of generosity, and that the value ordinarily assigned to it in courts of law is exaggerated."

Such pessimistic remarks are sometimes addressed by judges and lawyers to other judges and lawyers, seldom to the general public. But it is the public that sorely needs to learn how fallible much testimony is and why. The following discussion of witnesses is directed to that end.

When an honest witness testifies to something he saw, what does he do? He represents under oath that he accurately saw or heard some past event; that now, in the courtroom, he accurately remembers what he saw or heard; and that he is now accurately reporting his memory. Into each of these three—his initial observation of the event, his memory of that observation, his communication of his memory in the courtroom—error can enter, and often does. Let us consider each of those sources of mistaken testimony.

When a witness says, "I saw" or "I heard," what he really means is, "I believe I saw," "It is my opinion that I heard." His testimony consists of nothing but a report of his beliefs. A witness's beliefs, which derive from his reaction to an event, do not necessarily jibe with the actual facts. For observation is not a mechanical process. An eyewitness is not a tape-recording machine or a photographic film. He does not necessarily reproduce sights and sounds accurately.

Behind you, you hear tires screech and a sound like crashing automobiles. Then you look around and see two wrecked cars. You did not see the collision. But if later you are questioned, you are not unlikely to say (and believe) that you did see just how it happened.

"We never get any impression from the world raw," says C. E. M. Joad. "It is always cooked; and from the culinary operations of the mind there is no escape." William James said much the same: "Whilst part of what we perceive comes from the object before us, another part (and it may be the larger part) always comes out of our mind."

Sights and sounds serve us as clues to an occurrence, clues we interpret in line with our own previous experiences. An eyewitness, according to Robert William Otto, "mixes art with observation . . . and in this work of art, items which had their counterpart in reality are not distinguished from those which had not."

A witness's observation of an event does not precisely mirror the event. His mirror is imperfect; it distorts, to some extent, like the "funny" mirrors at a penny arcade. In the retina of the eye there is a "blind spot," but we ignore it, assuming that we see all there is to see. In the same way we fill in gaps in our observations of events. We "interpolate," with unconscious imagination, things we did not observe. We fill in what really is but bare outline, so as to meet what our past experience leads us to expect. We standardize most of our experi-

ences, disregarding the unusual. An experienced hunter, out for deer, mistakenly shot a horse. He explained that he was all set to see an elk and, when the horse appeared, he assumed that it was an elk. Similarly, a witness's perception is frequently governed by his wishes. "Men," said a judge, "are prone to see what they want to see." An observer is, says W. J. Arnold, apt to see what he expects—or wishes, or fears—to see, and overlooks what he is inclined to disbelieve. His perceptions may be controlled by his preconceptions. He supplements what he observed with what he thinks should have occurred.

There is an amusing story about a destitute Moslem boy in the United States who, because he insisted that he was heir to a huge fortune in India, was taken to a psychiatric hospital. Just about the time when the psychiatrists had convinced him that his belief in his wealth was a delusion, a State Department representative informed them that in truth he had inherited a million dollars.

We select, organize, and add to any experience; and so, in part, we make it. We mingle the objective facts with our subjective needs on which we base our impressions, our preconceptions. The great body of honest testimony, writes George Gardner, is "subjectively accurate but objectively false." We often "perceive what we expect to perceive rather than what actually occurs," so that we mistake "the moaning night-wind for a human cry, an innocent tramp for the escaped convict." Observations of happenings in the "outside world" are rarely pure, says the great criminal investigator Hans Gross; they are affected and transformed by imagination. Observing is a complex affair; it is mingled with inferences, judgments, interpretations. All observation, wrote James Sully, involves some unconscious inferences; consequently there is a thin line of distinction between observation and inference, and thus an "observation" often includes an "interpretative imagination."

An eyewitness is present when two men argue angrily in a bar. He sees one man raise his fist and the other fall to the floor. He thinks the first knocked down the second. In fact, if the truth were known, the blow was inflicted by a third man who came up in the rear, unobserved by this witness. But the truth may never be known.

You overhear two women talking. You think that you know the subject of their conversation. Unconsciously you fill in what you do not hear with what you think they said. "Much of the evidence introduced in court," says Gross,

"concerning threats and other spoken words is the witness describing not the language which operated on his senses but the conclusions he formed from them in his own mind. Men often . . . misinterpret what they hear." Few of us have cultivated the art of accurate listening.

For the ordinary witness, then, it is not true that a fact is a fact is a fact.

A blind man can't see a burglary. But a man by no means blind may have poor vision. Many witnesses, because of bad eyesight, give inaccurate testimony about a crime or its perpetrator. Army and Navy tests, and tests for applicants for driver's licenses, disclose that a large number of Americans see inadequately. Defects in vision account for many auto fatalities. Among these defects are "night blindness" and "tunnel vision" (an inability to see objects that are not straight ahead). Acuity of vision usually grows less as men grow older. They become nearsighted or farsighted. A color-blind witness will mistake the color of a man's hair or his overcoat; and color-blindness is more common than we generally suppose.

A deaf man can't hear a shot. A man partly deaf may not hear it or, having heard it, may misjudge the direction from which it came. Faulty hearing is not uncommon. So also is an incapacity to measure the lapse of time correctly; and a witness's incorrect time estimate may forfeit the life of an innocent defendant.

Menninger says that human beings with "deficient perceptual machinery" resemble "radios with bad aerials." Many persons do not know, or are unwilling to admit to, their "bad aerials." If they appear as witnesses, their mistakes of observation may not be discovered.

The principal reason for many a witness's faulty observation of a criminal act is this: He was an observer of the crime by chance only, since for him it occurred unexpectedly. He saw it, so to speak, out of the corner of his eye; it was on the margin of his vision, out of focus.

Compare this happenstance observation with that of a scientific observer. A physicist, conducting an experiment in a laboratory, has carefully prepared himself to be a witness. He meticulously records what he sees, and records it the moment after he sees it. He employs precision instruments as an aid to his observation. He makes every effort to allow for the personal equation. Supplied with his written report of his ob-

servation, other physicists can repeat the experiment under almost exactly the same conditions. The witness of a robbery or a murder, however, engages in no carefully prepared observation. He is not equipped with instruments of precision. Usually he does not immediately record his observation. What he observed is not something that can be substantially repeated, so that others can have the same experience. In other words, unlike a scientist, the ordinary witness has not concentrated his attention on what happened.

Not always is his inattention caused solely by the fact that he did not plan to see the happening. Other factors explain his inattention. He may be fatigued, or suffering from a headache, or preoccupied with business problems. He may be badly frightened, and fright can severely diminish the capacity for accurate preception; if he were drunk, his observation would be faulty—and one can be drunk with fear.

An observer's interests and his training affect his attention. A hunter is exceptionally sensitive to the sound of a gun. An undertaker and a portrait painter will look differently at a dead man. A garage mechanic will detect things under the hood of a car that an ordinary driver does not notice. A policeman's view of a burglarized house may differ from that of its owner.

Concentration of attention on some aspects of a situation will screen out other aspects; it confines our hearing and seeing to a limited part of an occurrence, and the rest, for us, is practically nonexistent.

One writer remarks on "the wonderful variety with which the details of a transaction are described by a variety of witnesses, each relating incidents which especially attracted his attention and omitting all others."

Akin to a witness's inadequate attention are his illusions of the senses that induce misinterpretations of things actually perceived. If two equally long lines are at right angles to one another, the vertical one looks longer; so testimony about a man's size may depend on whether the witness saw him lying on the ground or standing, and a witness tends to overestimate the height of a building or the distance up a hill. There is a tendency to think that small angles are right angles, to overestimate the size of any empty room or an empty lot, and to underestimate the size of a small person in the company of a large one. In a dark night a small man dressed in white looks tall. You are alone in the house, the stairs creak, you are sure someone has entered. Your collar is too tight and

you think you are being stifled.

"Most human beings," says Arnold, "are from time to time subject to illusions; indeed, nobody is always sober and intelligent in all his perceptions. . . . The luminous center of our intelligent perception is wrapped in a cloudy half-shadow of illusion."

Related are hallucinations, when we seem to see or hear something real that in fact does not exist: A fever, or pronounced fatigue, or overeating, or hunger, or loss of blood, or "drugs," or fear, may cause such imaginings.

Witnesses' illusions and hallucinations poison their observations and produce false testimony that may jeopardize innocent men. As these witnesses are seldom aware that they were thus self-deceived, defense counsel may not know that they were, and thus may not even try to expose their perhaps dangerous mistakes.

Facts do not register impartially or identically with all observers. The facts they perceive are not, for them, objective, but are subjective. The outer world and their respective inner worlds combine, interwind, and in differing ways for each one. Each dwells partly in a world of his own, compounded uniquely of the internal and the external. He observes in terms of his unique needs, personality, temperament, emotions. According to Hans Gross, the individuality of the particular person makes his perception individual, and makes it almost the creature of the one who perceives. Each observer interprets what he observes in his own peculiar fashion. He "puts the stamp of his personality on the facts," says Wladimir G. Eliasberg. What he sees does not match objective reality except in part; it blends with his inner self.

The word "observation" is, indeed, too abstract and artificial. We should, instead, speak of different persons engaged in observing. " 'Tis with our judgment as our watches, none go just alike, yet each believes his own," said Alexander Pope. "Every experience," maintains psychologist Abraham Myerson, "is modified by the experiencer." The physiologist Roger Williams informs us that, physiologically, the uniformity of human beings is a myth; that the "average man," the "normal man," is a fiction; that different people live in different worlds "so far as their sensory reactions are concerned"; that sight sensations, hearing sensations, and smell sensations widely differ in different individuals; that "every human

being has a pattern of existence which is distinctively different from all others and enormously different from many others"; that "no individual has a pattern that even remotely approaches what we may idealize as that of 'normal man'"; that "normal" individuals have their abnormalities, and "abnormal" individuals have their normalities. In sickness and in health their responses vary.

Shakespeare wrote, "Time travels in divers places with divers persons. I'll tell you who Time ambles withal, who Time trots withal, who Time gallops withal, and who he stands still withal." Unfortunately such individual differences in time perceptions, or in any other perceptions, cannot be easily discovered.

One's emotional attitude at the moment of observing makes a difference; an electrical engineer reports that even the color the eye sees depends on the mood of the observer. A witness's emotional condition may depend on a tiff he just had with his wife or on a hangover from a spree. His prejudices, too, influence his perceptions, and those prejudices may not be constant.

From all this it follows that one witness's reaction to an observed external, objective happening may be different from the reactions of another witness of that happening. "No two witnesses can have the same experiences when they observe the same event," says the psychologist J. S. Gray.

Since in a trial, all facts for the trial judge or jury are necessarily past facts—of which the judge or jury can learn only from witnesses' testimonies—the memories of witnesses become crucial.

But how reliable is anyone's memory? Can you tell accurately what you ate, and the conversation you had with two friends, at lunch a month ago?

We have already seen how unreliable a witness's observation of an event may be. Mistakes of memory are even greater. Seldom can one carry for any length of time his recollection of his past perceptions. Even if I correctly saw the goings-on in a street fight on January 10, 1955, my recollection in April 1957 of that fight may well be far less correct. In recollecting a past experience I do not repeat it. My recollection is a "new experience." Memory does not "mirror" the past; memory recreates the past.

In that re-creating process memory often adds something the witness never saw. Many a witness remembers what

pleased him, forgets the distasteful. His memory is colored by his likes and dislikes. Most of us put too much faith in our own and in other people's memory. We readily recognize that every man forgets most of the things he has experienced. We do not equally recognize that, when a man does recall a past experience, his recollection may easily misrepresent actualities of that experience.

Each of us has a store of "buried memories." What we consciously remember represents but a tiny fragment of that store. Hypnosis, the sight of an old hat, the smell of leather, the sound of a creaking hinge may provoke a recollection of a forgotten ten-year-old incident. Just how and why we remember, just how and why we forget, no one can completely explain. Although the workings of memory have been studied for centuries, they remain a good deal of a mystery.

The most frequent cause of a false memory, according to William James, consists of "the accounts we give others of our experience. Such accounts we almost always make both more simple and interesting than the truth. We quote what we should have said or done rather than what we really said or did; and in the first telling we may be fully aware of the distinction. But ere long the fiction expels the reality from our memory, and reigns in its stead alone." As another psychologist puts it, "Memory excited for the second time is partly a memory of the first attempt to remember. Often we are unable to distinguish one from the other. Then the first mistake becomes permanent."

Pride subtly contaminates memory. Writes Nietzsche, " 'I have done that,' says my memory. 'I cannot have done that,' says my pride, and remains inexorable. Finally my memory yields."

Think of the angry differences between former President Truman and former Secretary of State Byrnes about what each said and wrote to the other with reference to Byrnes's dealings with Russia. Or the dispute as to whether *The Forrestal Diaries* contained a correct report of a letter from Senator Taft to Truman about Taft's pleasure in the defeat of Dewey. The differing recollections were pretty plainly affected by pride.

Pride plays an even more important part in trials. Suppose that the police ask you about a case of purse-snatching that happened in your presence three months ago while you were waiting for a bus. Actually you were not very attentive at the time; you were thinking of your day at the office, or a

date you had for that night, or your sore throat. But now, at the police station, you think that you remember the details of the purse-snatching. You identify the suspect as the man who did it. At his trial you so testify. On cross-examination defense counsel challenges your memory. This challenge makes you angry. For each of us has a singularly strong egotistic pride in his memory, feeling it a very part of his inner self. Major marital quarrels can develop when a wife differs from her husband's recollection of some trivial occurrence. As a witness you will resent any doubt about your memory as an assault on your basic integrity, a presumptuous intrusion on your personality. The more the lawyer cross-examines, the more stubbornly you stick to your story, more than ever sure that you are right. Your show of sincere righteous indignation may well persuade the jury. But an honest witness's belief in the accuracy of his memory is no guarantee that he is correct. "Many a man with a pure conscience," said a country editor, "has only a poor memory."

When a judge tries a case without a jury, he seeks to discern witnesses' errors of memory. So we have many court opinions in which judges have commented on the way an honest witness will unconsciously falsify his memory. Here are some examples of such judicial comments: Witnesses, "with ease, can persuade themselves that they remember bygone circumstances" that never occurred. "It is a very common thing for an honest witness to confuse his recollection of what he actually observed with what he persuaded himself has happened." "There is a danger that, even a conscientious person, in trying to narrate a transaction which exists in his memory in a faded or fragmentary state, will, in his effort to make the reproduction complete and natural, substitute fancy for fact, or fabricate the missing or forgotten links." "We easily believe what we wish to believe." "Memories are much inclined to accord with desires." "It frequently happens that a person, by long dwelling on a subject, thinks that a thing may have happened, and he at last comes to believe that it actually did occur." "Witnesses who are perfectly honest are in danger of turning inference into recollection." "The effort of the memory often supplies circumstances harmonious with the general impression of a fact or event, but which are supplied only by the imagination."

These judicial utterances march with the views of many psychologists. They tell us that what is lost from memory is often replaced by products of the imagination; that, in mem-

ory, our wishes or our fears transform or transpose what really happened, so that, for instance, we change the time or the place of past observed incidents and actions are omitted, substituted, or inserted in the series of observed events; that a witness may "remember what he imagined as if it were a real memory of an actual fact." The psychologists refer to "creative forgettery," "imaginative memory," to the way imagination "retouches the details" and fills in the gaps in memory. They say that imagination works with memory and "often does the larger part of the task," that it "tidies up" our recollections, giving them greater coherence than the remembered experience actually had, interpolating facts never perceived, and changing the emphasis on the component details; that the "end product of a recall process is often a memory illusion"; that we "corrupt" and partially falsify the past by a "confusion of fact and imagination"; that much "self-deception enters into the processes of memory"; that our minds are "refracting media," and the past reappears to us not as it actually appeared but in numerous ways altered and disguised by the intervening spaces of our conscious experience, so that what we seem to see in the act of recall is thus very different from reality. Just as the eye has a "blind spot" of which we take no account, so the eye of memory has its blind spots of which we are so unaware that in all honesty we recall things we did not observe. Using a somewhat like analogy, one psychologist mentions the color blindness of memory.

We have previously noted that each person's perception of an event is unique. So, too, is his memory. What a man remembers, how long he remembers, and the conditions that cause him to recall what he remembers, says the psychologist J. S. Gray, all depend on his own peculiar "internal factors." They include his unique inherited abilities; his unique aches and pains, hunger, thirst, fatigue, disease; his unique life experiences. Men differ in their memories of certain kinds of experience. Some have exceptional memories of sounds, others of color, of touch, or taste.

Memory and "forgettery" are inseparably related. Psychologists once thought that forgetting results from a passive "fading" or "decay" of memory owing to the lapse of time. Now they think that forgettery is a more active process, a result of the passage of time filled with new events, of lively interest to the rememberer, that interfere or inhibit or obliterate his recollection of the old. In this process the individ-

ual's unique interests loom large. Thus each man's individuality influences his rate of forgetting particular sorts of past incidents. "Is it any wonder," Gray sagely asks, "that a witness's report of something he saw at a distant date is different from that of another who observed the same event?"

The courts, then, agree with the psychologists about the treachery of memory. They agree that memory is the weakest element in testimony; that, because of the numerous unknown factors that affect it, a witness's memory is often not trustworthy as a proof of any fact in a trial.

The courts give counsel a wide latitude in cross-examining an adverse witness in an effort to show that he has a prejudice for the side that called him. So counsel for the accused is permitted to bring out the fact that a prosecution witness, for instance, has long been hostile to the accused because of an old business dispute or out of jealousy. For the judges well know that such a bias or prejudice colors a witness's observation or memory. Courts have said, "Even where witnesses are upright or honest, their belief is apt to be more or less warped by their partiality or prejudice for, or against, one of the parties. It is easy to reason ourselves into a belief in the existence of that which we desire to be true, whereas the facts testified to, and from which the witness deduces his conclusions, might produce a very different impression on the minds of others." "A witness may have a strong bias from what he conceives to be the justice of the case, so that with entire innocence he may recall things which have never occurred, or forget important instances which have occurred."

The trouble is that often an honest witness's prejudices are unconscious: Without himself being aware of it he may, for obscure reasons, be hostile to the accused. Usually any such unconscious, hidden bias cannot be exposed at the trial.

Yet such a concealed prejudice, unknown to the witness or anyone else, may be the cause of the gravest mistakes in his testimony. Because of his buried unconscious animosity toward the accused he may have distorted the facts of a robbery he saw, or may mistakenly identify the accused as the man charged with murder.

Other kinds of unconscious prejudice may perniciously influence memory: You see a fight between the police and union pickets. Your original impression was confused. If you are an ardent union sympathizer, you may later remember with clarity that the police brutally assaulted the pickets.

"Honest" bias, says Gardner, may "be the deciding factor in filling in the gaps of memory."

A frequent cause of unconscious prejudice is a witness's partisanship owing to the fact that one side or the other called him as a witness. Here are some comments of some highly experienced lawyers: "Partisan witnesses," says Arthur Train, may "swear convincingly to facts of which they have no real knowledge, such as that they saw the defendant strike the complainant, exactly how he did it, the words he said, and that the complainant made no offer to strike the defendant. From allowing their minds to dwell on their own conception of what must have occurred they are soon convinced that it did occur in that way, and their account flows forth with a circumstantiality that carries with it an irresistible impression of veracity." "Perhaps," writes Francis Wellman, "witnesses usually feel more or less complimented by the confidence that is placed in them by the party calling them to prove a certain state of facts, and it is human nature to prove worthy of this confidence. That fact arises not from an intention deliberately to falsify but from the desire to be an important element in the case."

It is most important, therefore, to note this remark by another well-known lawyer: "Nothing is more deceitful than half the truth, and biased witnesses are much addicted to half truths. Such a witness is more dangerous than one who commits a gross perjury." "Unconscious bias," says Gardner, "is more dangerous than conscious bias. In everyone there is 'an empire of subconscious loyalties,' likes and dislikes, preferences and hatreds, some . . . unconscious . . . all entering into and affecting what we perceive, how we perceive it, and, most important of all, how we recall it."

No matter how accurate a witness's observation and memory, his testimony will mislead the jury if the jury misunderstands what he says. A trial is a process of communication between the witnesses and the jurors. It goes wrong if the witnesses do not communicate correctly.

If Antonelli, an Italian witness, does not speak English, he speaks to a translator, familiar with Italian and English, who translates for the jury what the witness says. A witness, not a foreigner, may so use our language that he conveys a wholly wrong impression. He may use words in his own peculiar and unusual way, according to a sort of private code or personal dictionary. Practically, he is speaking in a "foreign"

language, that is, foreign to his listeners. But, as he seems to be speaking English, no one translates his words. Misunderstanding results.

A young child, telling his father about his geography lesson, said that he had learned that the equator "is a menagerie lion that goes around the earth." Adults make similar mistakes.

The written report of a U.N. debate on a Pakistan-India dispute showed a Pakistan delegate saying, "Six soldiers have raped thousands of Pakistan women." Actually the delegate had referred to "Sikh soldiers."

The meaning of a word, it has been said, is not in the word but in the person who uses it and persons who hear him. We too glibly assume that we always understand one another. There is frequently an illusion of communication, an erroneous assumption that we invariably know what others mean. Frequently we talk past one another.

In a criminal trial, breakdowns of the communication process between witnesses and the jury may spell disaster for the accused. Newman Levy tells this story: Cohen was on trial for assault. He had the habit, attributed to many Jews, of answering a question with a question. When, on the witness stand, he was asked, "Did you strike McGuire?" he indignantly replied, "I struck McGuire?" The jury found Cohen guilty. His lawyer then moved that the judge enter a judgment of acquittal for Cohen because the evidence was not sufficient to justify the verdict. The prosecutor, pointing to the typewritten transcript of the testimony, asserted that Cohen had admitted his guilt in saying, "I struck McGuire." The stenographer, in writing up the testimony, had omitted the question mark and substituted a period. Fortunately for Cohen, the judge was familiar with this Jewish trick of speech and remembered Cohen's answer. Cohen was set free. Unfortunately for many other defendants, such misunderstandings may not be detected.

All of us, most of the time, judge the truth of what a man says to us by the way he says it. We remark, "He looked me square in the eye," or, "He had a shifty gaze." Similarly, the judges lay great stress on the "demeanor" of a witness while testifying in the courtroom—his gestures, grimaces, intonations, his straightforward or evasive manner, his facial expressions, his hesitations, his fluency. That is one reason why, in a criminal trial, most of the witnesses are required to tes-

tify in court rather than by written, sworn, typewritten statements: The accused is entitled to have the jury observe the witness's appearance and manner of testifying. The witness's demeanor has been called "language without words."

The courts say that this demeanor "is often a complete antidote to what he testifies." "A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may carry a most favorable impression." "Every person who has had experience in the trial of jury cases knows that the jury give close attention to the manner of witnesses while testifying, and are sometimes more strongly influenced by appearances than they are by the words of the witnesses. A juror can see as well as hear, and has the right to use his eyes and ears in making up his mind as to what weight, if any, shall be given to the evidence of a witness." Judge Joseph Ulman said that "a stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the mere words signify. The best and most accurate written record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." "The right of the accused to have a witness subjected to the personal view of the jury is a valuable right, of which he should not be deprived . . . except by necessity."

However, although "demeanor evidence" (as it has been called) helps often to illuminate the truth or falsity of testimony, it may do just the opposite. Demeanor can be deceptive. An unscrupulous lying witness, well trained in perjury, may not betray himself by his manner. He may look the jury square in the eye; he may have an excellent "poker face." One may smile and smile and be a villain.

On the other hand, an honest witness may so behave as to arouse the jury's distrust. He may have an unpleasant, squeaky voice or a habit of twisting his fingers. He may be restless, peevish, or he may talk in a sneering manner. If he is nervous and timid, especially when fiercely cross-examined, he may seem furtive and evasive. For, it has been said, "His apprehensions and conjectures often work through his imagination on his memory, until without intending falsehood he omits or colors facts . . . irreconcilable with the truth. No sooner are his ideas uttered, however, than he becomes conscious of their errors. If he now attempts an explanation, it usually results in his entire discomfiture. If he persists in

the misrepresentation or concealment, a new cause of embarrassment arises in the fear of subsequent exposure, and leads to still more harmful falsehoods and suppressions. Thus, with the best intentions at the outset . . . a nervous, apprehensive witness may retire suspected of the grossest perjury . . ." A distinguished lawyer, testifying in a recent case, was "so careful to qualify every statement and refine every bit of his evidence, that the jury took the word of a perjured loafer and street-walker in preference." Said Arthur Train, a veteran of many criminal trials, "An assertive lie is of much more weight with a jury than an anemic statement of the truth . . . Oftimes a witness leads the jury to suspect that he is a liar because he has too strong a sense of the proprieties of his position [as a witness] vehemently to resent a suggestion of untruthfulness" when cross-examined.

It is tough enough for the innocent defendant when he faces adverse witnesses who are honestly mistaken but "normal." His dangers increase when those who testify against him are "abnormal" and their abnormalities are not obvious.

Maybe you think this seldom happens. But a ponderable percentage of our population is not "normal." The estimates vary. One physician declares that at least 30 per cent of a general practitioner's patients require some psychiatric treatment. A psychiatrist says that about 8 per cent of Americans have been inmates, at some time, of mental hospitals; the number of disturbed persons not hospitalized must be much larger. Another psychiatrist remarks that "any large family without some psychotics is quite an exception." Chronic alcoholics are numerous, with their number apparently on the increase. As men in prison often testify for the prosecution as alleged accomplices of a defendant, we cannot ignore the high percentage of prison inmates diagnosed as mentally defective or disordered; in Sing Sing, a few years back, some 11 per cent were so diagnosed. How many Americans are seriously "neurotic" no one knows, but it seems safe to say that 15 per cent are.

In varying degrees these "abnormals" have importantly distorted perceptions and memories. The alarming fact is that, when their abnormalities are unknown, many of them make an excellent showing on the witness stand. This is singularly true of the "psychopathic liar," the alcoholic, and the man with a so-called "psychopathic personality." The highly disturbed neurotic may appear a serene and accurate witness,

at worst only an eccentric; but his hidden, subjective fears and anxieties, unrelated to the external situation, may markedly interfere with his capacity to perceive or recollect accurately. An aged witness, white-haired and dignified, may impress a jury. But he may suffer lapses of memory that he cleverly conceals, even from himself, filling in the gaps with falsities. To make matters worse, there are witnesses, young in years, afflicted with "premature senility," who have similar difficulties that they similarly conceal.

Said Hans Gross, "The numberless errors in perceptions derived from the senses, the faults of memory, the far-reaching differences in human beings as regards sex, nature, culture, moods of the moment, health, passionate excitement, environment, all these things have so great an effect that we scarcely ever receive two quite similar accounts of one thing; and between what people really experience and what they confidently assert, we find only error heaped on error." Gross, after noting that several witnesses, speaking of the same incident, will differently characterize it as "a very ordinary event" or "altogether a joke," or "quite disgusting," says, "Now is it possible to think that people who have so variously characterized the same event will give an identical description of the mere fact? They have seen the event in accordance with their attitude toward life. One has seen nothing; another this; another that; and, although the thing may have lasted only a very short time, it made such an impression that each has in mind a completely different picture which he now reproduces. One man overlooks half because he is looking at the wrong place; another substitutes his own inferences for objects; while another tends to observe the quality of objects and neglects their quantity; and still another divides what is to be united, and unites what is to be separated. If we keep in mind what profound differences may result in this way, we must recognize the source of the conflicting assertions by witnesses. . . . In order to know what another person has seen and apprehended, we must first of all know how he thinks, and that is impossible. If we know, at least approximately, the kind of mental process of a person who is as close as possible to us in sex, age, culture, position, experience, etc., we lose this knowledge with every step that leads to differences. We know well what great influence is exercised by the multiplicity of talents, superpositions, knowledge and apprehensions. . . . The individuality of the parti-

cular person makes [his] perception . . . individual, and makes it almost the creature of him who perceives."

A renowned English lawyer wrote: "The power to tell the truth, which implies accurate observation, knowledge of the relative importance of facts, and power of description . . . is much less common than people usually suppose it to be. . . . A man's power to speak the truth depends upon his knowledge and his power of expression. His knowledge depends partly on his accuracy of observation, partly on his memory, and partly on his presence of mind; his power of expression depends on an infinite number of circumstances . . . A man's will to tell the truth depends on his education, his character, his courage, his sense of duty, his relation to the particular facts as to which he is to testify, his humour for the moment . . ."

"It would be correct, I think, to say," writes Sir Frederic Eggleston, a famous Australian trial lawyer, "that no witness can be expected to be more than 60% correct, even if perfectly honest and free from preconception." "From my experience as a man, a lawyer, a prosecuting attorney, and a judge," said a noted jurist, "I am compelled to say that the most uncertain thing I know of is human testimony." Mr. Justice Dixon of Australia once remarked that the ability to observe correctly "is an idiosyncracy, and that the ability to give evidence in the witness-box in a clear, definite and convincing manner is also an idiosyncracy, but that the two idiosyncracies are not necessarily related."

The next time a dozen or so friends visit you, try something like this witness game: While they are conversing, arrange that two men, strangers to your guests, dash into the room. One of the two men will point at you, shouting, "Damned rascal." The other will burst an inflated paper bag. You will fall on the floor, groaning. The two men will run out of the house. Immediately afterward ask each guest to write a description of what happened. Almost certainly the descriptions will differ remarkably from one another. Dozens of experiments of this sort have so demonstrated.

Earlier we called attention to the way a stool pigeon's testimony may endanger the innocent. A similar danger attends the prosecutor's use of a related type of testimony—that of a man who confesses to a crime, turns state's evidence, and testifies that the accused was his accomplice. Strangely enough, often jurors are impressed by such testimony: They believe

that the confessing accomplice tells the truth in order to clear his own conscience.

Actually the prosecution frequently assures an accomplice that he will not be prosecuted if he gives testimony against the accused. That assurance may put a premium on perjury. The same may be true when, without such an assurance, the accomplice has some reason to hope that he will not be indicted if he "co-operates" with the prosecutor. And the tendency to lie is also considerable when the witness has confessed, pleaded guilty, but has not yet been sentenced: He hopes that his "co-operation" will bring a light sentence.

In many states the judge will warn the jury to be wary of an accomplice's testimony. In some states, by statute, a man cannot be convicted on such testimony standing alone: it must be "corroborated." This would seem to mean that someone else must give supporting testimony. But several courts have held that it suffices if some other witness supports a part of the accomplice's testimony that has nothing at all directly to do with the crime. A noted legal authority writes: "Suppose the accomplice tells . . . of a murder and states in the course of his testimony, 'I had my shoes shined that morning at a shoeshine stand on Broadway.' Subsequently the prosecution introduces the shoeshine boy as a witness who testifies, 'Yes, I shined the shoes of Mr. Accomplice that morning.' Granted the truth of that insignificant fact, it in no manner connects the defendant with the commission of the offense. Yet such proof is poisonous . . . The difficulty . . . is caused by a fallacious belief that, if the accomplice is telling the truth about one thing, he is telling the truth about all things."

Having in mind not only perjurious and psychologically "abnormal" witnesses but also the numerous errors of honest "normal" men and women who testify, we say again that many a mistaken witness for the prosecution may be a lethal weapon directed at the accused, endangering his life or liberty.

Little wonder that Learned Hand, our wisest judge, remarked after years of service as a trial judge, "I must say that, as a litigant, I should dread a law suit beyond almost anything short of sickness and death." He was speaking primarily of civil-law suits, but what he said applies in full to an innocent defendant in a criminal trial.

Jurors are themselves witnesses—witnesses of what goes on at the trial. They must determine the facts of the case from what they see and hear, that is, from the words and demeanor of the testifying witnesses. The jurors are, then, witnesses of the witnesses.

Now if those who testify are not to be likened to scientific observers, no more are jurors. They may make mistakes similar to those of the testifying witnesses: They may misunderstand, or forget, some of the testimony. Think of the effect of inattentiveness alone: A witness ignored or forgotten is not "psychologically present"; his testimony is absent "psychologically." Inattention may, then, mean that a fact is not comprehended; it is therefore out of the case, for all practical purposes. But that fact may be most important as proving the defendant's innocence.

Drop in at some jury trials and you will probably see that, now and again, some of the jurors have fallen asleep. More often some of them are woolgathering, thinking of their personal affairs instead of listening attentively.

If some jurors have defective hearing, they may entirely miss or misunderstand defense testimony about an important point in the case; and a considerable number of persons, especially the elderly, have some impairment of hearing. The communication process between key defense witnesses and a partly deaf juror is out of order, like a telephone receiver off the hook. Similarly, a juror's defective eyesight may interfere with his observation of an important witness's demeanor.

The jury's deficient memory of the testimony may lead to error. And recollection of testimony can easily go wrong. "Every practicing attorney," says a leading trial lawyer, "is familiar with the daily recurring spectacle of lawyers and judges disagreeing as to what testimony has been given by a witness a short time before. Thus even men of trained minds, whose attention is riveted upon the witnesses, who realize the importance of every word, may receive inconsistent impressions of the witnesses' narratives." If trained lawyers and judges have such faults of memory, how much more must that be true of jurors who necessarily lack such training.

Also, like the testifying witnesses, the jurors may have undetected prejudices, conscious or unconscious. They may have a bias against the defendant or against some of his wit-

nesses. Those prejudices may lead a jury to convict an innocent man.

"The truth will out" is, alas, not invariably true. It is often untrue because the jurors have no adequate guides for determining which witnesses speak truthfully and accurately. Cross-examination as a revealer of lies, prejudices, and mistakes has been much overrated. To evaluate the reliability of a witness's testimony would in most instances require a knowledge of his personality that the jury cannot acquire from seeing and hearing him for a brief time in the courtroom.

Some lawyers and judges consider trials by jury more hazardous for the innocent than trials without a jury. In England, the original home of the jury, today in most criminal suits (except those involving a possible death sentence) the defendants waive a jury trial, as they do in Baltimore County, Maryland, even when the charge is murder. Those who deem a juryless trial safer for the innocent, often recommend statutes providing for a trial by a three-judge court. They think that well-trained, experienced trial judges are superior to jurors in evaluating testimony, or at any rate that we could train trial judges who would be less likely to make mistakes than jurors.

However, it would be unwise to conclude that invariably the perjury or errors of witnesses, or the mistakes of the trial judge or jury, harm the accused. They may help him. And not only if he is innocent: They may lead to acquittal of the guilty.

3

One might think that a criminal trial should be, and is, a courtroom investigation of all the available evidence, an investigation so conducted that it will enable the jury to ascertain the truth, as nearly as men can, as to whether the accused committed the robbery or murder.

If anyone thinks that today a trial is such an investigation, he should read this description by Quentin Reynolds (an excellent reporter) of a famous murder case: "Neither Neary [the prosecutor] nor Leibowitz [defense counsel] was missing a trick in this courtroom battle. Each was at his brilliant best, and Judge Courtney, knowledgeable, completely fair, supervised the legal duel the way a really great boxing referee handles a championship fight." Reynolds speaks of "the excitement" of "watching two champions in action."

Essentially that is the legal profession's current conception of a fair trial: A fight between lawyers according to certain ground rules that the trial judge, as a referee, will enforce, with the jury giving the decision to the winner.

Many lawyers assert that this fighting method does bring out the truth. They declare that the best possible way for a jury to discover the facts is to have the lawyer for each side try, as hard as he can, in a keenly partisan spirit, to bring to the jury's attention the evidence favorable to his side and to discredit the evidence introduced by the other side.

Undoubtedly that view contains much good sense: The eagerly partisan lawyers do present and underscore evidence that might otherwise be overlooked. Nevertheless the over-emphasis on the idea of a trial as a fight frequently has the effect of preventing the uncovering of vital evidence or of so presenting vital evidence as to distort it.

Edmund Morgan, one of the ablest students of trials, notes that, while our leading lawyers praise the fighting-trial method as the best way to ensure the ascertainment of the actual facts, those same lawyers express "admiration for those members of their profession who are most adept at the manipulation of courtroom procedures for the obfuscation of issues and the confusion of juries." Sir Edward Clarke, former Solicitor-General of England, admiringly described the techniques of Sir John Taylor Coleridge, a famous English trial lawyer: "His cross-examination was always painstaking and ingenious, and the more closely the witness was entangled in the net the more suave and gentle was the manner of the cross-examiner. But the main characteristic of the process was its studious unfairness. Coleridge was in the habit of repeating a witness' answer or quoting it in a subsequent question. And somehow the phrase as repeated or quoted was not exactly the same as the witness had first used. The change was very slight, not sufficient to provoke comment."

Under the spell of the conception of a trial as a fight the legal profession endorses as wholly reputable some tactics, or tricks of the trade, that, dispassionately considered, do not (to say the least) conduce to an accurate determination of the facts. You will find those wiles and stratagems explained in dozens of books on trial techniques, written by eminently respectable and experienced trial lawyers. Those books are designed to be read by other lawyers—not by the general public.

Many of these tactics relate to the handling of witnesses.

The lawyer, these books advise, has a duty to give the jury, if possible, a false impression of testimony disadvantageous to his side, even if the lawyer does not doubt the witness's honesty and accuracy. If an honest witness is timid, the lawyer, by cross-examination, should play up that weakness in order to confuse the witness and persuade the jury that he is concealing important facts. One of the books, discussing "the truthful, honest, over-cautious witness," says that "a skillful advocate by a rapid cross-examination may ruin" that witness's testimony.

To tangle up most witnesses by such means is fairly easy. For the role of witness represents a frightening experience for the ordinary honest person. "The novelty of the situation," a judge has said, "the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected . . . and the confusion of cross-examination . . . may give rise to important errors and omissions."

Many witnesses are confused by the unaccustomed formality and by the "Yes" or "No" kind of answers usually required by the courts. We are told by Henry Taft, a distinguished lawyer, brother of former Chief Justice Taft, "Counsel and court find it necessary through examination and instruction to induce a witness to abandon for an hour or two his habitual method of thought and expression, and conform to the rigid ceremonialism of court procedure. It is not strange that frequently truthful witnesses are misunderstood, that they nervously react in such a way as to create the impression that they are either evading or intentionally falsifying."

The manuals of trial strategy suggest that a lawyer should goad an honest but irritable witness so that he will display his unpleasant characteristics in their worst form, in order to discredit his testimony. "You may," it is written, "sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. . . . Make him lose his temper and seem spiteful. For juries dislike spite in the witness box." A capable cross-examiner, faced with an honest but egotistic witness, should "deftly tempt him to indulge in his propensity for exaggeration so as to make him 'hang himself.' "

It is proper, say the books, to bring out a minor inconsistency in an honest witness's testimony, and then to blow it up to huge proportions, charging him with unreliability. One

of these manuals applauds a cross-examiner who so impaired an important honest witness's credibility on an "immaterial matter" that the jury found for the cross-examiner's client. Another trick, when cross-examination shows up such an inconsistency, is not to allow the witness then to explain it; if, on redirect examination, the witness does explain, the explanation will probably come too late to rehabilitate him with the jury. Questions should be put to an adverse honest witness in rapid-fire order, giving him little time to think out his answers. A lawyer should never, on cross-examination, "thoughtlessly ask the one question which will supply an omission in his opponent's case." "In cross-examination, the main pre-occupation of counsel is to avoid introducing evidence or giving an opening to it which will harm his case." The lawyer "must beware of strengthening his opponent's case by eliciting damaging truths from an adverse witness."

There could be little cogent criticism of those devices if they were practiced solely on an adverse witness when the lawyer knew of, or had some doubt about, that witness's untrustworthiness. But the treatises on trial techniques urge the use of such tricks on a witness whose testimony the lawyer knows to be completely reliable. Those treatises commend the kind of treatment of a witness portrayed by Anthony Trollope: "Nothing would flurry the [witness the lawyer was cross-examining]. . . . The more [the lawyer] might persevere in such an attempt, the more dogged and steady she became. He therefore soon gave that up . . . and resolved that, as he could not shake her, he would shake the confidence the jury had in her. He could not make a fool of her, and therefore he would make her out a rogue. . . . As for himself, he knew well enough that she had spoken nothing but the truth. But he . . . so managed that the truth might look like falsehood,—or at any rate to have a doubtful air."

An old lawyers' adage says, "If you have no case, abuse the opponent's witnesses." Today some lawyers and judges frown on that tactic. But an American judge wrote recently, "Don't bully witnesses—unless of course you know how." You may recall the passage in Dickens' *Pickwick Papers* describing the cross-examination of Mr. Winkle, in which he was asked how often he had seen Mrs. Bardell. Dickens concludes the scene thus: "On this question there arose the edifying brow-beating, customary on such points. First of all, Mr. Winkle said it was quite impossible for him to say

how many times he had seen Mrs. Bardell. Then he was asked if he had seen her twenty times, to which he replied 'Certainly,—more than that'. Then he was asked whether he hadn't seen her a hundred times—whether he couldn't swear that he had seen her more than fifty times—whether he didn't know that he had seen her at least seventy-five times—and so forth; the satisfactory conclusion which was arrived at, at last, being, that he had better take care of himself, and mind what he was about. The witness having been by these means reduced to the requisite ebb of nervous perplexity, the examination was continued. . . ."

These ways of dealing with witnesses are surely not those that would be used were a trial primarily a painstaking, orderly inquiry for the discovery of the truth. No one, in making a business decision, would dream of obtaining the necessary information on which to rest his decision by subjecting his informants to the treatment we compel witnesses to suffer at a trial. As Trollope put it: "One would naturally imagine that an undisturbed thread of clear evidence would be best obtained from a man whose position was made easy and whose mind was not harrassed; but this is not the fact; to turn a witness to good account, he must be badgered this way and that till he is nearly mad; he must be made a laughing-stock for the court; his very truths must be turned into falsehoods, so that he may be falsely shamed; he must be accused of all manner of villainy, threatened with all manner of punishment; he must be made to feel that he has no friend near him, that the world is all against him; he must be confounded till he forget his right hand from his left, till his mind be turned into chaos, and his heart into water; and then let him give his evidence. What will fall from his lips when in this wretched collapse must be of special value, for the best talents of practised forensic heroes are daily used to bring it about; and no member of the Humane Society interferes to protect the wretch. Some sorts of torture are as it were tacitly allowed even among humane people. Eels are skinned alive, and witnesses are sacrificed, and no one's blood curdles at the sight, no soft heart is sickened at the cruelty."

That nineteenth-century description still often holds true. A recent work on trial tactics says, "A witness is the harried victim of our legal system. . . . Too often the innocent witness is treated as if he were a public enemy."

As part of the harrying a lawyer may bring out shameful incidents, long past, in the life of a now honest witness, that

will render him embarrassed or angry and, as John Wigmore says, "may unfairly lead him to such demeanor and utterance that the impression produced by his statements does not do justice to his real testimonial value." An able prosecutor recently described a criminal trial as "a legal chess-game where the witnesses are the pawns."

Another corollary of the gaming or fight theory is that often, in practical effect, the lawyers, rather than the parties, are on trial, since the lawyers are regarded as "two champions in action." The books on trial tactics warn that the verdict depends to a great extent on whether the jury likes or dislikes the one or the other lawyer. Beginning with their opening speeches, throughout the examination of the witnesses, and until at the very end the judge charges the jury, the lawyers are constantly on view, dominating the trial. They occupy the foreground; the parties to the suit, and the evidence, the background. As Morgan says, a trial is "a game in which the contestants are not the litigants but the lawyers." Accordingly, the trial guidebooks caution the lawyer to keep everlastingly in mind how he appears to the jury. Here again a trial run on the fight theory differs remarkably from an investigation bent on the determination of the truth: The jury's verdict is apt to be a judgment on a lawyer's "points" in his manner of fighting rather than a calm evaluation of the evidence.

Judge Learned Hand has said, "About trials, hang a suspicion of trickery and a sense of result depending upon cajolery or worse." After describing our trial methods a noted lawyer comments, "I do not think I am exaggerating when I say that the evidence contains only kaleidoscopic fragments of the facts. It is as if a checker of light and dark patches were held over reality. All that gets down in the record is that seen through the light patches." Morgan, reviewing a standard book on trial tactics, writes, "Intended as a lawyer's book, it will in all probability be read only by lawyers and those who would be lawyers. And fervent prayers that the book be read by no others should be raised by those who want to believe, and want others to believe, that a law suit is a proceeding for the discovery of truth by rational processes. If only some lawyer could rise up and honestly denounce Mr. Goldstein as a defamer of his profession! If only Mr. Goldstein himself had written his book as an exposition of the evils inherent in our adversary system of litigation! If only a reviewer could assert that this book is a guide not to palaces

of justice but to the red-light districts of the law! But a decent respect for the truth compels the admission that Mr. Goldstein has told his story truly. He has told it calmly, without pretense of shame, and (God save us!) without the slightest suspicion of its shamefulness. He has shown by his own unperturbed frankness with what complaisance the profession, which would smile the superior smile of derision at the suggestion of a return of trial by battle of bodies, accepts trial by battle of wits. In all innocence, he has produced a document which is a devastating commentary upon an important aspect of our administration of justice."

Cantor remarks, "Anyone familiar with criminal trial practice knows they are not conducted in the spirit of getting at the facts no matter where they lead. The prosecution and defense introduce evidence which bolsters their respective contentions and deliberately keep out of the court record any data likely to injure their case. The attorneys are interested in gaining a victory rather than in presenting all the evidence which may lead to the truth. The modern criminal trial is a combat, not an inquiry."

Consider the blithe assumption that the fighting method does elucidate the truth better than any other method which could be devised. A legal authority says that this is an assumption "no one but a lawyer could make. It is not the way that anyone else tries to find out the truth about anything. . . . It is not the method which businessmen employ in the conduct of their affairs. It is not the method that lawyers themselves employ when they really want to find anything out."

We can scarcely blame a reflective, conscientious prosecutor for using the wiles and stratagems we have been describing. He is in a peculiar dilemma: The courts say that, in a distinct sense, he is an "officer of the court," that he owes as much a duty to protect the innocent defendant as to convict the guilty, that he "should act not as a partisan eager to convict, but as an officer of the court whose duty it is to aid in arriving at the truth in every case." Attorney General Brownell avowed, a few years ago, that "the primary responsibility" of a prosecutor "is not that he shall win his case, but that justice is done. His should be a two-fold aim—that the guilty shall be 'brought to book' and that the innocent shall go free." If the prosecutor adheres single-mindedly to that principle, he will want to see to it that the accused has the

opportunity fairly to present to the jury all honest testimony that may aid the defense, and therefore the prosecutor will want to avoid the tactic of discrediting a witness he knows to be truthful and accurate.

But the prosecutor owes another duty, that of convicting a criminal. He must contend with defense lawyers who employ the sanctioned tricks. If, from his study of the evidence before the trial, the most conscientious prosecutor feels sure of the defendant's guilt, naturally he will believe that he must not let the lawyer for the accused get away with it by a one-sided resort to the conventional, reputable tactics that impede the jury's ascertainment of the facts. The prosecutor easily convinces himself that he must "fight fire with fire."

It is difficult to condemn him—as long as we continue to view a trial as predominantly a fight. But, as a result, an innocent defendant may be victimized: The conscientious prosecutor's determination to fight fire with fire has its justification, for him, in his sincere belief, formed before the trial begins, in the defendant's guilt. Because the prosecutor has thus prejudged the case, he feels it proper, in the interest of justice, to make the jury distrust an honest defense witness, since otherwise a man whom the prosecutor thinks a wicked crook will go free.

In an article published in 1956 an able, decent federal prosecutor, Whitney North Seymour, Jr., frankly presented this attitude. "One frequently hears," he said, "the prosecutor referred to as a 'quasi-judicial officer.' This is essentially true. But the reference is usually made as a term of criticism thrown up during a trial when the prosecutor is fighting his hardest to protect the government's case. At this time most of the prosecutor's quasi-judicial functions have long since passed, and he is an eager lawyer trying to protect his client's interests. Well-intentioned attorneys and laymen sometimes misunderstand this spirit of advocacy on the part of the prosecutor, and urge that he should be acting with judicial calm in the courtroom rather than with a barrister's zeal. As noted previously, the Canon of Legal Ethics define the prosecutor's job as follows: 'The primary duty of a lawyer engaged in a public prosecution is not to convict, but to see that justice is done.' That is precisely the way we conceive our jobs. The definition principally comes into play, however, when a case is first brought in to the office and is being readied for Grand Jury presentation. This is where we exercise our judicial role in making our decision as to whether to

prosecute or decline. When we decide to prosecute, it is because we decide that this is how justice will be done. The decision is reached only after we have satisfied ourselves of the defendant's actual guilt. When our belief in the defendant's guilt is fortified by the Grand Jury's decision that he be held for trial . . . our judicial function is relinquished to the judges who will sit on the various stages of the case. . . . Finally, at trial, when false issues are injected, unfair attacks are made on the witnesses, or perjured testimony is given by a defendant trying to lie his way out of a just conviction, the prosecutor becomes the most zealous champion of justice you can imagine. He is then a full-fledged fighting advocate; and he should be. He must act with candor and fairness, but he must also fight for his cause. To do otherwise would be to violate his duty in the most real sense. His job is now to fight fairly and firmly with all his might to see that truth and justice prevail."

You will note Seymour's underlying premise: Once the prosecutor, before the trial, is "satisfied . . . of the defendant's guilt," then his primary responsibility is that "he shall win his case," and it is entirely up to the judge to "see that justice is done." The prosecutor is now free, says Seymour, to use all the conventionally approved fighting artifices and stratagems. Convinced that the accused is guilty, the prosecutor may easily persuade himself that defense counsel engages in "unfair attacks" on prosecution witnesses, and that the defendant is "trying to lie himself out of a just conviction."

But is it in the interest of justice that, by resort to such stratagems, the prosecutor, on the basis of his prejudgment, impedes a fair presentation to the jury of what actually may be honest, accurate defense testimony? His prejudgment of the defendant's guilt may be mistaken: Perhaps the police, having carelessly investigated the facts, presented him with inadequate data on which he formed his judgment; perhaps a key defense witness he disbelieves is telling the truth. Yet the prosecutor's prejudgment, although it may be erroneous, will, according to Seymour, justify him in ceasing to act, in any special sense, as an "officer of the court" and in leaving it to the judge to "see that justice is done," justifying the prosecutor in "fighting for his cause" with unhampered use of those fighting tactics that may prevent the jury from getting as close as possible to the real facts. The employment of those tactics, thus justified, may result in the conviction of an innocent man.

We shall not be rid of this dilemma of the conscientious prosecutor, with its resultant menace to the innocent, until we drastically modify the fight theory of a trial, until a criminal trial more closely resembles a hearing in the best of our juvenile and domestic-relations courts. There the fighting spirit is much diminished, and the quest of the actual past facts predominates.

The reflective, conscientious prosecutor will sometimes be disturbed by his dilemma; he will sometimes use the conventional artifices with reluctance.

However, to state it mildly, some prosecutors, less reflective, have no such nice scruples. Politically ambitious, they hunger for the prestige bestowed by the publicity of a successful career as a prosecutor. They know that such prestige has landed many a prosecutor in the governor's mansion or in the United States Senate. For such political purposes success means making a record for the largest possible number of convictions.

With alacrity and no disturbing doubts a completely honest prosecutor, bent on political advancement, gladly accepts the fight theory of a criminal trial. Dealing no blows considered foul according to the rules of the fighting game, he delights in the accredited tricks, condoned by the courts, to win victories. He publicizes the victories as the scourging of society's enemies. He does not stop to think that a victory won by those tricks may, in a fundamental sense, constitute a defeat for society when it puts the wrong man in prison or the electric chair.

We may have to grant that today the sanctioned fighting theory justifies a conscientious prosecutor in availing himself, at a trial, of the accepted stratagems. But that theory cannot excuse his carelessness in investigating for himself the facts before he brings a man to trial. For (as Seymour says) it is on the basis of that investigation that the prosecutor makes up his mind that the accused is guilty and that therefore it is proper to use the accredited tricks of the trade. The prosecutor's duty to protect the innocent should always include a duty to protect them from unfounded accusations of crime.

But a politically ambitious prosecutor may forget that duty. As we noted earlier, he is likely to develop what Sam Hobbs (a lawyer with long experience as an F.B.I. agent) calls an "occupational disease," a prosecutor's bias in pre-

trial investigations of crime, a "habit of drifting into a chronic spirit of hostility toward each new suspect."

It may be thought that pre-trial carelessness, resulting from such bias, is of no great moment, since an unfounded prosecution will end in an acquittal. Not necessarily. The cases we have narrated reveal that there may be evidence that, although it would have shown up as mistaken on a thorough investigation, will persuade a jury to convict. Even, however, if the jury acquits the erroneously indicted man, the experience may work him lasting harm. Many a person has been impoverished through the expenses incurred in obtaining an acquittal.

Moreover, the stigma of the charge cannot be easily erased. In the public mind the blot on the accused's reputation is seldom wiped out by a not-guilty verdict. The public in general, or his neighbors in particular, may remember the accusation and still suspect him of guilt even after an acquittal. Finally, think of the anguish of the innocent man, negligently indicted, fighting for his life or liberty.

Also it needs repeating that in pre-trial investigation the negligence that brings an innocent man to trial involves a deviation from the prosecutor's major duty—that of convicting the guilty man. In trying the wrong man the prosecutor allows the "right man" to go uncaught. A vicious murderer may remain at large, to kill again. To indict someone who actually is not guilty gives the community but an illusory sense of safety.

Writing of the prosecutors' bias, Sam Hobbs says, "To any sensitive observer, contact with an average prosecutor's office . . . is an experience to be shunned. . . . Few responsible Americans ever realize that the prevailing attitudes in these 'citadels for the protection of society' are often the very antithesis of what should be the ideals in an American society."

"All the rules in the world will not get us substantial justice," said Wigmore, if lawyers—and this includes prosecutors—"have not the correct moral attitude. . . ." Can the courts do anything to foster such an attitude? A little, perhaps. When—as happens occasionally but not often—a prosecutor's misconduct becomes known to a court—as, for instance, when he gets before the jury highly prejudicial evidence that is not properly admissible or makes grossly improper remarks to the jury—the court can roundly condemn him. Now and then, on that ground, an upper court sets aside

a conviction. But, altogether too often, the upper court affirms a conviction, contenting itself with a rhetorical flourish about the prosecutor's unseemly conduct, remarking that he failed to act as "an officer of the court," a "servant of the law," and had gone far "beyond the canons of decorum . . . which a governmental officer should observe." Such remarks, without more, may be worse than useless. Practically, they add up to actual approval of the criticized misconduct. For the kind of prosecutor who, eager to procure a conviction, resorts to such improper tactics, will act on the assumption that almost always, in the future as in the past, the courts will merely express displeasure and will not upset the prosecutor's victories. The court's deprecatory words become purely ceremonial. The misbehaving but victorious prosecutor gladly pays what to him is a small price—a ritualistic verbal spanking, a mere slap on the wrist.

A California court said a few years ago, "It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then to have . . . the features of a fair trial distorted to secure a conviction." Alas, frequently the courts live up to those expectations of prosecutors.

One lawyer tartly comments on the difference "between the pollyanna statements of the courts as to the manner in which the prosecuting counsel should conduct themselves and the apathy of the same courts to render relief when the prosecutor fails to adhere to the standards of impartiality." If, by unfair, improper tactics, a prosecutor wins victories, he will usually gain the plaudits of the public, which he values more than the court's disapproval of his conduct. Prosecutors, said Mr. Justice Robert Jackson, "who have been rebuked by the courts are frequently promoted by the public."

Earlier we quoted Judge Bernard Botein, who, in his admirable recent book, *The Prosecutor*, insists that "a ruthless, resourceful prosecutor, indifferent to the rights of defendants, can with little risk win headlines or fame . . . Fiction," he says, evokes "our detestation for the loathsome district attorney who would offer the defendant as a human sacrifice on the altar of his ambition and vanity . . . But in real life," we "unwillingly . . . admire and vote for the type of prosecutor we loathe in fiction—provided he puts on a resounding show in lashing the helpless suspect . . . It is safer politically for a prosecutor to ride roughshod over the rights of an accused, provided he does so with energy and fanfare, than to

proceed cautiously with scrupulous regard for those rights. The latter course might be misconstrued as coddling criminals or official laxity . . . In real life there is no helpful author to convince us of the innocence of the defendant . . . I do not recall any prosecutor ever becoming a cropper because of the harshness of the methods he employed—provided he did not invite scrutiny by some collateral political blunder."

Judge Botein entertains a more optimistic view of prosecutors than does Sam Hobbs. The judge says that only a few prosecutors engage in the practices he denounces, but that those few are "dangerous out of all proportion to their number." The remedy, he writes, "is not to strip prosecutors of any of their powers"; the remedy lies in discouraging "abuse of those necessary powers through a critical public made aware of prosecuting methods." When, in that way, we get rid of the "loathsome" kind of prosecutor, then, according to Judge Botein, presumably innocent defendants will be protected.

It may be that such "abuses" will be somewhat discouraged by so educating the public. But Judge Botein's remedy seems insufficient for several reasons: Only to a limited extent can those abuses be publicly exposed. Consequently, to ensure that prosecutors are appropriately sensitive to defendants' rights, we must have prosecutors who do not need public disapproval to induce them to behave decently. Fortunately there are many prosecutors of that kind. But why do we have some who abuse their powers? Is it because they are wicked men? Maybe some are, as Judge Botein maintains. But the basic trouble is that seldom, before his election or appointment as a prosecutor, has a lawyer had any intensive special training in the peculiar obligations of his office. Most law schools fail to provide him with such training. He will usually, therefore, take over unreflectingly those practices of some of his incumbent associates, practices that cannot be squared with the obligations of prosecutors that the courts purport to demand.

We should, then, change the manner in which prosecutors are chosen. In the many parts of this country where prosecutors are elected, the only required qualification for holding that office is that the incumbent has attained voting age and is a lawyer. We should have as prosecutors—it is said repeatedly—lawyers of standing, integrity, industry, ability, and experience. How shall this reform be achieved? In most

countries on the continent of Europe a lawyer does not become a full-fledged prosecutor until he has served satisfactorily as an apprentice to older, experienced prosecutors, who are themselves imbued with a sense of the prosecutor's moral obligation to protect the innocent. Something of this sort we need in the United States.

Such a reform, coupled with Judge Botein's remedy of alerting the public to the "abuses" of prosecutors' powers, might well eliminate those "abuses."

But what of those prosecutorial methods that today are not considered "abuses," methods that conform to the conventional rules of the game, and that Judge Botein does not deplore. As matters now stand, a prosecutor who uses those devices is not "indifferent to the rights of defendants," since the defendants have no legal right to object to them. When the most honorable, sensitive prosecutors continue to resort, as they do, to the approved trial tricks and stratagems, one may reasonably doubt whether innocent accused men will always receive adequate protection. Such men will often be in jeopardy until, at the very least, we substantially revise the present belief that a trial is and must fundamentally be a fight or sporting contest.

4

Because of a fairly recent legal reform, today in a civil (noncriminal) lawsuit in a federal court (and the same is true in many state courts) either side before trial is entitled to what is called "discovery." To illustrate: Thomas Henry sues Wilfred Turner for breaking a contract. Turner, to help himself defend the suit, can require Henry to disclose, before the trial, most of the evidence Henry possesses and may introduce at the trial. The idea behind that reform is this: If Turner, in advance, knows the evidence that may be used against him, he can often obtain evidence to answer it. Suppose Henry has in his possession a letter from Turner to Henry, saying that Turner would not carry out the contract. Turner may have forgotten that he wrote the letter. But if, by "discovery" before trial, he learns of the letter and that Henry intends to use it as evidence, Turner may be able to find, in an old file in a warehouse, a memorandum of a later phone conversation between the two men in which Turner said that he was now willing to perform his contract. Turner, too, if he knows the witnesses who will probably testify against him, has the right, before trial, to question

them at length under oath. If the suit is in the federal court or in the courts of certain states, he can, in advance of trial, compel the production of written statements that may help his defense, provided he cannot, by diligence, obtain that evidence otherwise. Thus, by "discovery," the full truth about the facts is much more likely to be brought out in court, and justice much more likely to be done.

For a long time most lawyers opposed that reform. They argued that it would deprive the lawyer for one side of the chance to surprise the other during the trial. Many lawyers prized this opportunity to offer surprise testimony. It caught the opponent off guard, with no time to seek out, interview, and call witnesses to rebut the surprise testimony. One eminent lawyer, in a lecture to other lawyers on trial tactics, said, "Of course, surprise elements should be hoarded. Your opponent should not be educated about matters concerning which you know he is still in the dark. Obviously, the traps should not be uncovered. Indeed, you may cast a few more leaves over them so that your adversary will step more boldly on the low ground, believing it is solid." Many cases have been won in that way—cases that otherwise should have been lost. The surprise tactic was part of the theory of a trial as a game, as a contest of wits between lawyers, in which a lawyer legitimately used evidence "as one plays a trump card or holds back a good horse until the home stretch."

The majority of American lawyers now welcome "discovery" in non-criminal cases. Strangely, however, most American courts grant little or no "discovery" to defendants in criminal cases. There the theory of a trial as a fight or game still prevails, and with it the right to use strategic surprise. Yet one would think that, since life or liberty is at stake, we would be more generous in helping the accused in a criminal case to defend himself than the defendant in a non-criminal case who stands to lose only money.

It should much disturb us that, except in the U.S.A., today in every civilized land the accused, in advance of trial, is informed of the evidence the government will present against him.

In England and Canada, before an accused is put on trial, there has to be a preliminary court hearing at which the prosecution discloses all its evidence. The suspect hears the testimony of all the government's witnesses and has the right to cross-examine them, and he also sees all the documents the government proposes to use.

The refusal of most American courts to do the same is squarely at odds with our boast that an accused person is entitled to a fair trial, and that a fair trial means the opportunity to meet the charge against him. Suppose, for example that with no previous warning to the defendant, a government witness testifies in 1955 that he met the defendant on the street in Chicago on April 15, 1950, and talked with him about plans for a robbery. Had the defendant, before the trial, known that there would be such testimony, he might have been able to locate witnesses who would testify that on April 15, 1950, he was in Mexico. When, however, he hears for the first time at the trial the testimony of the adverse witness, the defendant has no time to search for and find the witnesses who saw him in Mexico five years ago. Seldom will a trial judge interrupt a criminal trial to allow a defendant to conduct such an investigation.

Suppose the government has photographs of the fingerprints of the criminal, or has had its experts examine bloodstains or make ballistics tests. Most American courts will not order the government, previous to the trial, to permit experts for the accused to examine the photos of fingerprints, or the bloodstains, or the bullets. Nor will they require the prosecution, before trial, to produce evidence, in the defendant's favor, that the prosecution has but does not intend to introduce at the trial. Only when a defendant is charged with a crime where the sentence may be death do all American courts require the government to supply the defendant with the names of its witnesses.

Without advance notice of damaging adverse evidence the defendant does not have a real opportunity to meet the charges against him. For instance, if the defendant's lawyer is not informed of the testimony of a principal prosecution witness, he cannot prepare his cross-examination, a task that requires careful preparation. If we want criminal trials to reveal the truth as far as is humanly possible, to bring about the acquittal of innocent persons and not to remain a sporting adventure, we will fall into line with all other civilized countries in giving the accused full advance knowledge of the evidence the government intends to introduce at his trial.

It is argued against our doing so that an accused who, before trial, knows the government's evidence will attempt to meet it by perjured testimony. If that argument were cogent, then "discovery" in civil cases would be equally unwise. How to detect perjury in a trial is indeed a problem, but a problem

arising in all kinds of lawsuits, not merely in criminal proceedings.

The "perjury argument" has been advanced against almost every important legal reform. For many years, because of fear of perjury, in a civil-law suit between Roberts and Smith, it was the rule that neither Roberts nor Smith was allowed to testify, even if they were the only persons who knew the facts. We abandoned that ridiculous rule in spite of the fear that, as Roberts and Smith each had an important interest in the outcome of the lawsuit, they would be likely to perjure themselves.

Experience in England and Canada shows that advance disclosure of evidence in a criminal case has not alarmingly increased perjury. "Ah," it is said, "the English are far more law-abiding than Americans." Whether or not that estimate of the English is correct, the same cannot be said of Canadians, whose habits are substantially the same as ours. In the few American states that grant liberal discovery to the accused the dire predictions have not been borne out.

Sometimes it is urged that, when the accused is a member of a criminal gang, advance disclosure of the government's evidence will result in the intimidation or bribing or "bumping off" of prospective government witnesses. Canada, no less familiar with such gangs, has not, on that account, rejected discovery to accused persons. At most, it should be provided that the trial judge, if he finds that an accused is a member of a criminal gang or the kind of person who might bribe or intimidate or kill hostile witnesses, should have discretion to deny the accused the right of discovery.

The possibility that a dishonest defendant will misuse the "discovered" information is not a good reason for doing injustice to an honest defendant, by refusing him the fair means of clearing himself. Surely an innocent man should not suffer in order to prevent professional criminals from tampering with the evidence or with witnesses.

Indeed the denial of "discovery" has this paradoxical consequence: A guilty defendant knows the facts about the crime without any disclosure by the government; if he is unscrupulous, he will fabricate evidence. Only the innocent man is kept in ignorance of what the government plans to prove.

The Supreme Court of Maryland, one of the few American courts that accords fairly liberal "discovery" to the accused, said in 1947, "We are not impressed by the fear . . . that [it] . . . will make the securing of proper convictions more dif-

ficult to obtain. It apparently has not had that effect elsewhere . . ." And the highest Louisiana court, although it conceded the possibility that the defendant might manufacture evidence, said, "We do not think this fact . . . should outweigh the danger of convicting an innocent accused."

Efficiency in law enforcement, to ensure punishment of the guilty, comes at too high a price when it costs the guiltless their lives or liberties. As Jerome Hall says, "the easier it is . . . to prove guilt, the more difficult it becomes to establish innocence." A prosecutor's heaven (where such efficiency would be paramount) might well mean a hell for the innocent.

Behind the refusal to give the accused "discovery" lurks the idea that the witnesses who testify against him are the "government's witnesses" and that therefore the government has a right to exclusive possession of them until they appear in court. That idea is preposterous. The government does not "own" a witness.

There is still another argument made against "discovery" in criminal cases: As the defendant has a constitutional right not to testify or to disclose his evidence before the trial begins, the state, it is argued, ought to be in the same position: What is sauce for the goose is sauce for the gander. This reciprocity argument has not won favor in England or Canada. If it has any validity, then it might be provided that a defendant, in order to obtain "discovery" from the government, must disclose the evidence he intends to present in his defense. Something similar is already the practice in the federal courts and in some states: If the defendant wants to use an alibi as a defense, he must so advise the prosecutor, stating what he intends to prove and the names of the alibi witnesses; the prosecution must then tell the defendant the names of the witnesses it will call to rebut the alibi defense.

If a criminal trial is still to be considered a game, it should be a game fairly played; the cards should not be stacked against the defendant. To shift the metaphor, a trial is now a sort of cat-and-mouse game and, as someone has said, at least the mouse ought to have a peek at the cat's claws. But it should not be a game; it should be a diligent search for the truth.

5

No one knows how many innocent men, erroneously convicted of murder, have been put to death by American gov-

ernments. For—as we noted in an earlier chapter—once a convicted man is dead, all interest in vindicating him usually evaporates.

However, there are several known instances like that of Edward Larkman (described in Chapter Seven): Just a few days before the date set for Larkman's execution, Governor Alfred E. Smith commuted the sentence to life imprisonment—and several years later new evidence proved Larkman innocent. In Wentzel's case (Chapter Five) Judge Maxey referred to "the well known case of John Bradford, an innkeeper who, upon hearing groans from one of the rooms, snatched a knife to defend himself and entered the room to investigate, where he found one of the guests 'weltering in his blood in the bed'. Others came to the room and found Bradford 'terror stricken'. He was arrested for murder, tried and hanged. Sometime afterwards it was established that the murder was committed by another guest who upon stabbing the victim escaped from the room two seconds before Bradford entered it."

Such instances demonstrate the intolerably monstrous nature of any death sentence: It cannot be undone. It may mean the judicially sanctioned governmental murder of the guiltless.

To those officials who, nevertheless, oppose the abolition of capital punishment, we might apply these words of G. K. Chesterton: "Now it is a terrible business to mark a man out for the vengeance of men. But it is a thing to which a man can grow accustomed . . . And the horrible thing about public officials, even the best . . . is not that they are wicked . . . not that they are stupid . . . it is simply that they have got used to it."

6

We come back to what we said at the outset: The fact that trials are human affairs, and therefore necessarily imperfect, does not at all call for distrust of every conviction. Many witnesses give reliable testimony. By and large our system works justly. It accords many safeguards to those on trial for crimes. We may assume that, on the whole, men in prison are not innocent.

However, that assumption does not justify complacency. It is an exceedingly difficult task, even in the most favorable circumstances, for a jury to find that a man did commit a crime. As our courts now usually conduct criminal trials, the

circumstances frequently fall far short of the most favorable. For instance: The ordinary treatment of witnesses is the least calculated to elicit testimony that is accurate or seems accurate; the tricks of the trade prevent the best humanly possible determination of the actual facts; many of our practices often seriously impede accused persons from presenting evidence that might persuade the jury to find in their favor. We dare not assume—at least without some major reforms of our methods of administering justice—that all innocent men will be safe from imprisonment or the death chair.

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